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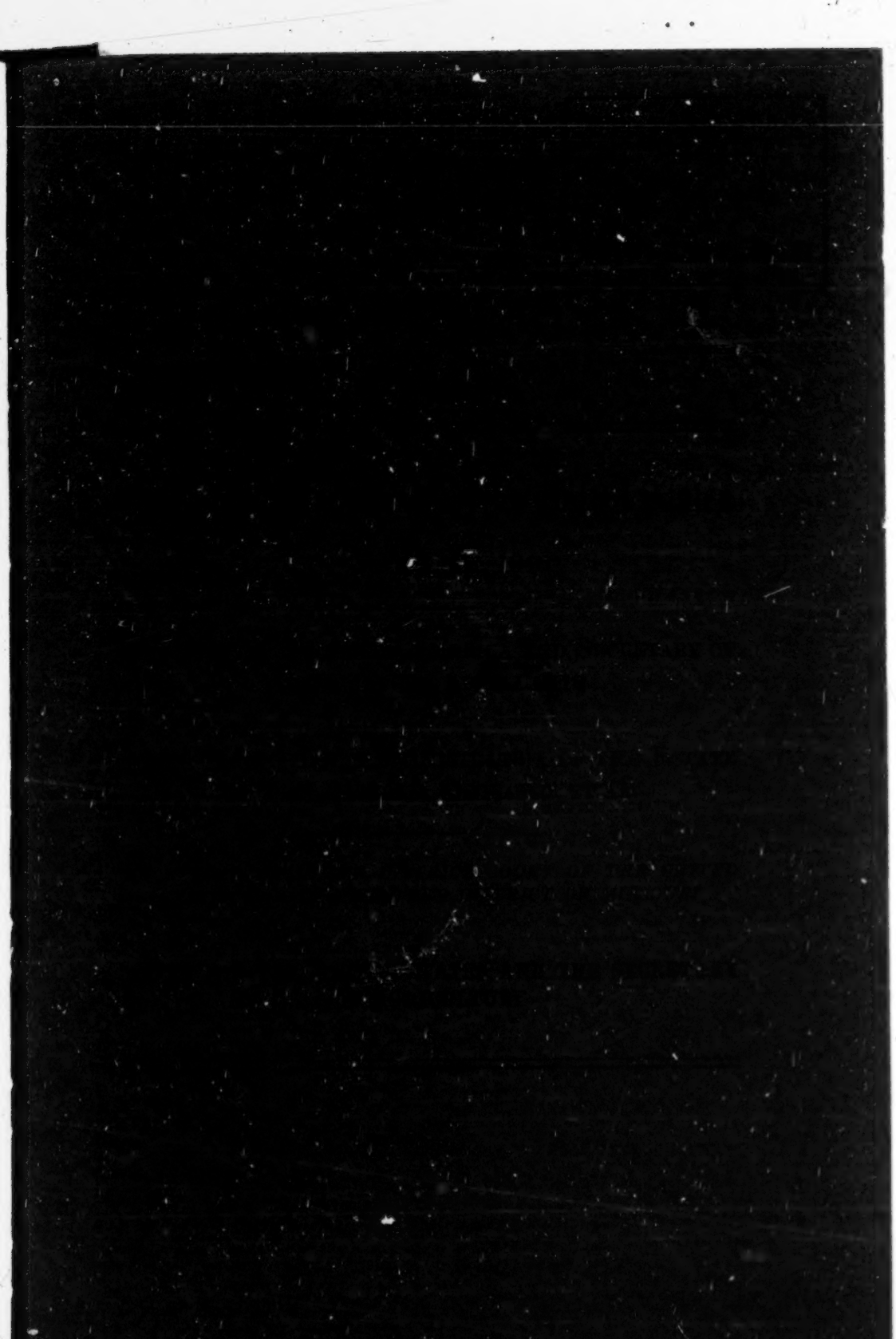

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 640

THE UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

ALICE M. MORGAN, ADMINISTRATRIX OF THE ESTATE OF F. O. MORGAN, DECEASED, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 1305–1333) is reported in 32 F. Supp. 546.

JURISDICTION

The final order and decree of the District Court was entered on May 29, 1940 (R. 346). Petition for appeal was filed and allowed on June 25, 1940 (R. 352, 358). The order of May 29, 1940, has

been stayed pending determination of the cause by this Court (R. 349). On January 13, 1941, this Court noted probable jurisdiction.

Jurisdiction of this Court is conferred by Section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168, 7 U. S. C. Sec. 217); the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220, 28 U. S. C. Secs. 44 and 47a); and the Act of February 13, 1925 (c. 229, 43 Stat. 938, 28 U. S. C. Sec. 345).

STATUTE INVOLVED

The pertinent provisions of the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159–169, 7 U. S. C. Secs. 181–229), are printed in Appendix A, *infra* pp. 173–185.

QUESTIONS PRESENTED

The Secretary of Agriculture, in a rate proceeding under the Packers and Stockyards Act, was held to have committed procedural error. He reopened the proceedings. The court below set aside the new order. The questions are:

1. Whether the court properly forced the Secretary (a) to testify as to his conduct, motives and mental processes in reaching his decision, and (b) to produce memoranda received from subordinates in the course of his deliberations.

2. Whether the court properly held the proceeding to violate the statute and due process because the Secretary (a) was not impartial; (b) improp-

erly reopened the proceeding; (c) failed to obtain new evidence; and (d) did not personally appraise the evidence.

3. Whether the order was supported by substantial evidence.

STATEMENT

On July 19, 1933, fifty market agencies, operating at the Kansas City stockyards, brought individual suits in the United States District Court for the Western District of Missouri to suspend, enjoin, set aside, and annul an order made by the Secretary of Agriculture on June 14, 1933, prescribing maximum rates to be charged by the market agencies for their services (R. 1–142).[1] The order was made by the Secretary in a proceeding instituted under the Packers and Stockyards Act, 1921, (c. 64, 42 Stat. 159, 7 U. S. C. Secs. 181–229) on April 7, 1930 (R. 23). On July 22, 1933, the District Court entered a temporary restraining order conditioned upon the impounding in the registry of the court of all amounts collected by the market agencies in excess of the rates and charges found to be reasonable by the Secretary of Agriculture in his order of June 14, 1933 (R. 143, 145, 166). The funds impounded aggregated approximately $586,000 on November 1, 1937; on that date the impounding ceased because a new schedule of rates

[1] The suits were later consolidated by stipulation for the purpose of trial and other proceedings (R. 154).

agreed upon by the Secretary and the market agencies became effective (R. 178).

After the entry of the impounding order, the District Court proceeded to hear the cause and on December 20, 1934, upheld the Secretary's order and dismissed the bills of complaint (R. 152, 1283). The market agencies appealed to this Court, which on May 25, 1936, reversed the decree below and remanded the cases for further proceedings on the ground that the District Court had erroneously denied the market agencies an opportunity to prove certain allegations to the effect that they had been denied a fair hearing before the Secretary. *Morgan* v. *United States,* 298 U. S. 468.

The District Court thereupon reheard the case, determined that the Secretary had given the market agencies a full and fair hearing, again upheld the Secretary's order on the merits, and dismissed the bills of complaint (R. 165, 1295). From this decision appellees prosecuted a second appeal and on April 25, 1938, this Court rendered an opinion reversing the decree of the District Court. *Morgan* v. *United States,* 304 U. S. 1. The Court held that the Secretary had failed to grant the full hearing required by the statute and that the order of June 14, 1933, was consequently invalid; the Court did not consider the merits of the order.

The United States and the Secretary of Agriculture (the appellants here) requested a rehearing on the ground, among others, that important ques-

tions as to the distribution of moneys impounded in the custody of the District Court remained undetermined. The appellees, in reply, asserted that this Court by its decision of April 25, 1938, had held that the impounded funds belonged to the market agencies and should forthwith be released to them. This Court denied rehearing on May 31, 1938, but its *per curiam* opinion indicated that the controverted question as to the distribution of the impounded funds was open to consideration in further proceedings. 304 U. S. 23, 26.

Accordingly, on June 2, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the order of June 14, 1933, had been entered, for the purpose of correcting the procedural irregularities which this Court had found existed in the prior proceeding and of making a valid determination as to the rates which were reasonable to be charged during the period of the impounding (R. 172). At the same time, the Secretary served on the market agencies, as tentative findings, conclusions, and order, a copy of the report and order of June 14, 1933, so that all parties might have adequate notice of the Government's contentions and ample opportunity to meet those contentions (R. 174). For the purpose of making any such ensuing order effective, appellants on June 7, 1938, moved the District Court to stay all further proceedings therein and to order the clerk to retain the impounded funds until such time as

the Secretary, proceeding with due expedition, should have entered a final order in the proceeding reopened by him (R. 170).

The District Court denied the motion and on June 18, 1938, entered an order directing that the funds be distributed forthwith to appellees (R. 187, 189). From this decision the United States and the Secretary of Agriculture appealed. On May 15, 1939, this Court reversed the District Court, holding (1) that the Secretary of Agriculture had statutory authority under the Packers and Stockyards Act to reopen the administrative proceedings, conduct further hearings, determine a reasonable rate for the period during which the funds were impounded, and, (2) that this determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, would afford the appropriate basis for action by the District Court in disposing of the fund in the court's custody. *United States* v. *Morgan*, 307 U. S. 183.

While the appeal was pending, the Secretary of Agriculture went forward with the reopened proceeding. Appellees successively filed (1) a motion to vacate the order reopening the proceeding, (2) an affidavit of bias and prejudice against the Secretary of Agriculture, (3) an affidavit as to changed conditions since the close of the prior hearings, (4) a further motion to vacate with an alternative request for the designation of an examiner to hear

evidence which appellees desired to produce relating to changed conditions since the close of the prior hearings, and (5) exceptions to the tentative findings of fact, conclusion, and order which had been served upon them by the Secretary (R. 409, 411, 415, 420). On August 26, 1938, the Secretary of Agriculture issued an opinion on appellees' several motions (R. 423). He refused to vacate the order reopening the proceeding and to disqualify himself on the basis of appellees' affidavit of bias and prejudice, but he granted the motion for the designation of an examiner (R. 422). On the same day an order was entered appointing John C. Brooke as examiner for the purpose of hearing argument upon the exceptions filed to the tentative findings of fact and conclusions and authorizing him to take such additional relevant and material evidence as the parties to the reopened proceeding might desire to offer with respect to conditions subsequent to June 14, 1933 (R. 422).

Thereafter hearings were held by the examiner. Appellees argued at length their exceptions to the tentative findings and offered evidence relative to conditions subsequent to June 14, 1933 (R. 1241–1271). The Government offered no evidence except that which was already of record in the prior hearings (R. 1241–1247). After the close of the evidence, the parties submitted proposed findings of fact and proposed orders for consideration by the examiner (R. 429). On January 17, 1939, the ex-

aminer filed with the Secretary of Agriculture and served on the parties his proposed findings of fact, conclusion, and order (R. 210). Thereafter both parties filed written exceptions to the examiner's report and on March 29, 1939, the Secretary of Agriculture personally heard oral arguments by the parties on such exceptions (R. 210–211). On June 20, 1939, the Secretary of Agriculture issued his findings of fact, conclusions, and final order determining the reasonable rates during the impounding period (R. 197–302). This order prescribed the same rates as those contained in the original order of June 14, 1933, although the supporting findings differed in some respects.

Pursuant to the opinion of this Court of May 15, 1939, appellants presented to the District Court the Secretary's order of June 20, 1939, and moved the court for an order requiring appellees to show cause why the impounded fund should not be distributed in accordance with the rates found by the Secretary to be reasonable (R. 193). Appellees in their return to the order to show cause challenged the validity of the Secretary's order on grounds both of procedure and of substance (R. 303, 319).

On January 9, 1940, the case came on for trial in the District Court (R. 376). Over appellants' objection, the court permitted appellees to call the Secretary of Agriculture as a witness in their behalf and to interrogate him upon matters relating to his consideration of the case after its submission

to him on oral argument (R. 382).[2] Also over appellants' objection, appellees were permitted to call for the production by the Secretary of written communications received by him from his assistants and subordinates during the course of his deliberations on the case and were allowed to introduce the communications in evidence (R. 388–391, 404–405).

On April 9, 1940, a majority of the statutory District Court rendered a decision holding that the Secretary's order of June 20, 1939, was invalid and that the impounded funds should be distributed forthwith to the appellee market agencies. The principal opinion was written by Circuit Judge Van Valkenburgh, and a concurring opinion was filed by District Judge Reeves (R. 1305, 1316). District Judge Otis dissented in a written opinion (R. 1321). On May 29, 1940, the District Court entered findings of fact and conclusions of law

[2] After filing the return to the order to show cause and prior to the trial, appellees served appellants with a notice that they would take the deposition of the Secretary of Agriculture in Washington, D. C. (R. 321). Appellants thereupon moved for an order denying appellees the right to take the deposition (R. 322–323). After hearing argument upon this motion, the court indicated that it would allow the deposition to be taken (R. 323). However, at appellants' suggestion an order was entered which permitted the taking of the deposition unless the Secretary would be available to appellees as a witness at the trial. Appellants thereupon agreed that the Secretary would be present at the trial, but did not waive their objections to his being called as a witness (R. 381–382).

purporting to conform to the opinions of the majority of the court (R. 339, 345).

The holding of the District Court that the order of June 20, 1939, is invalid rested primarily on procedural grounds. The court found that the Secretary of Agriculture was not an impartial trier of the facts (R. 343). On the basis of the Secretary's testimony the court found that subsequent to the oral argument the Secretary, out of the presence of appellee's counsel, conferred with the examiner concerning the evidence in the case and the findings to be made thereon and refused, prior to issuing his final order, to disclose the substance of those conversations to appellees (R. 342–343).

The court further held that the Secretary did not personally weigh or appraise the evidence either in its original form or as sifted and analyzed by his subordinates, but adopted as his own the findings in the examiner's report; and that the examiner had no authority to act as a trier of facts but, in any event, being under the domination and control of the Secretary, was not impartial (R. 337–338). The court found that the Secretary made no effort to ascertain the actual reasonableness of the rates for the impounding period by taking readily available evidence of actual conditions during that period, and that the evidence of record in the prior hearings cannot be considered as substantial in relation to that period (R. 336–337, 343).

Brief findings of fact were entered with reference to the merits of the case. It was found that the rates prescribed in the order of June 20, 1939, did not, as applied to any year during the impounding period, provide a margin over reasonable costs and profits as stated in the Secretary's order but, on the contrary, because of errors in the estimation of the yield of the rates and in the disallowance of certain necessary and reasonable costs, produced a yearly deficit in appellees' operations (R. 338). It was found that the findings contained in the order were not supported by substantial evidence (R. 343). It was also found that the examiner had excluded material facts and circumstances and had been uniformly upheld by the Secretary (R. 343).

The principal conclusion of law which the court entered was that appellees did not receive the full and fair hearing before an impartial tribunal which is required by the Packers and Stockyards Act and the Fifth Amendment to the Constitution (R. 344). Other conclusions of law entered by the court were that "This proceeding is no longer strictly an administrative matter under the Packers and Stockyards Act since the order of the Secretary under review determines rates for a past period rather than for the future" (R. 344); that the main purpose of the reopened proceeding was to make findings and an order which would assist the court in making equitable disposition of the impounded funds (R. 344); that the burden of making such

valid findings and order was upon the Secretary and that he failed to sustain the burden (R. 344). Addressed to the merits were the conclusions that the Secretary had erroneously excluded from consideration facts and circumstances material and relevant to the determination of reasonable rates (R. 338), and that the order of June 20, 1939, was unreasonable and without evidentiary support (R. 338). In summary the court held that acceptance of the rates contained in the Secretary's order as a basis of distributing the impounded funds would produce an unjust, inequitable, and unlawful result, and that the appellee market agencies were entitled to have the impounded funds restored to them (R. 344).

On May 29, 1940, the District Court entered a final order and decree setting aside the Secretary's order of June 20, 1939, and directing that the funds impounded in the registry of the court be distributed to appellee market agencies (R. 346). It is from this order and decree that the United States and the Secretary of Agriculture have prosecuted the present appeal.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the order of the Secretary of Agriculture issued on June 20, 1939, which determined just and reasonable rates to be charged and collected for stockyard services by market agencies during the period July 22, 1933, to November 1, 1937, is invalid and not the appropriate basis upon

which to distribute the funds impounded in the District Court.

2. In compelling the Secretary to testify as to his conduct, motives, and mental processes in reaching his decision on the order of June 20, 1939, and requiring him to produce memoranda received from subordinates during the course of his deliberations.

3. In holding that the Secretary did not grant appellees a full and fair hearing as required by the Packers and Stockyards Act and the Fifth Amendment to the Constitution.

4. In holding that the Secretary was not an impartial trier of the facts and did not give appellees the full and fair hearing before an impartial tribunal required by law.

5. In holding that the Secretary improperly initiated and conducted the reopened proceeding and throughout entertained a misconception of his duty under the law and the decisions of this Court.

6. In holding that the evidence offered by the Government in the reopened administrative proceeding cannot be considered as substantial evidence with respect to the impounding period.

7. In holding that the Secretary did not personally weigh or appraise the evidence, either in its original form or as sifted and analyzed by subordinates, but adopted as his own the findings of the examiner.

8. In holding that the proceeding before the Secretary was no longer strictly an administrative

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matter under the Packers and Stockyards Act and, therefore, the Secretary had failed to sustain the burden of making a determination which would furnish an equitable basis for the distribution of the impounded funds.

9. In holding that the findings contained in the order of June 20, 1939, are not supported by substantial evidence.

10. In holding that the rates prescribed in the order of June 20, 1939, did not produce sufficient revenue to allow appellees the costs and profits found by the Secretary to be reasonable for any year during the impounding period.

11. In holding that the Secretary excluded from consideration facts and circumstances material and relevant to the determination which he was undertaking to make.

12. In granting appellees' motion for the distribution of the impounded funds to them and in ordering that the funds be so distributed.

13. In failing to enter such orders with respect to the distribution of the impounded funds as were consistent with right and justice and the decisions of this Court.

SUMMARY OF ARGUMENT

The decision of the court below was placed chiefly upon the ground of procedural error. Yet, while the opinion is silent, the findings of fact and conclusions of law also contain a decision on the merits. In either case, it is to be noted, the decision

below must be reversed because there has been no determination of what are reasonable rates and the impounded moneys cannot in good conscience be refunded to the appellees. However, each branch of the decision below is wrong.

Part One

I

The court below compelled the Secretary to testify as to the manner in which he reached his decision, although the record was in all respects regular on its face. This was error, and fatal to the decision below which rests in substantial part upon the testimony of the Secretary.

It would be a shocking departure from accepted standards of propriety if a trial judge were forced to take the witness stand and defend himself against imputations of misconduct. *Crescent Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141; *Fayerweather* v. *Ritch,* 195 U. S. 276. The administrative agency must be accorded the same conclusive presumption of regularity. *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585. The circuit courts of appeals have uniformly ruled that the reviewing court cannot go behind an administrative record regular on its face and inquire into the methods and processes of decision. This rule seems as necessary for the integrity and value of the administrative procedure as it does for the judicial. Nothing in the allegations of the appellees or the

nature of this particular proceeding permits a different result.

II

The Secretary properly initiated and conducted the reopened proceedings.

A. The finding of the court below that the Secretary was not an "impartial trier of the facts" is an accusation supported only by a letter published by the Secretary, after his order had been held invalid because of procedural irregularity, which stated that the impounded funds "rightfully" belong to the farmers. (1) This statement simply reflected the fact that the Secretary's order had been upheld by the only court which had considered its merits, and cannot reasonably be construed to indicate that his mind would be closed to the force of new evidence and new arguments. (2) But even if the factual basis of the decision below were correct, there yet would be no disqualification. It may be assumed that the Act holds the administrative tribunal to the same criteria of impartiality as obtains for the judiciary. But Section 21 of the Judicial Code disqualifies only for a *personal* bias, with which the Secretary was not charged. And, as in the case of a court, if the Secretary chose to sit there can be no disqualification.

B. The Secretary properly reopened the proceedings by service of the 1933 findings and order.

As he explained, the summarization of the voluminous evidence there contained would "prove very helpful as a working basis for this hearing," and would be revised according to any additional evidence which the parties might introduce. Service of these findings, as the Circuit Courts of Appeals have ruled, completely cured the defects found in the proceeding in the second *Morgan* opinion. Nor was there any attempt at a *nunc pro tunc* validation of the order; this accusation is contradicted both by the Secretary's opinion and by the actual course of the proceedings.

C. The court below found further evidence of an improper proceeding in the failure of the Government to introduce new evidence. The ruling is unwarranted. (1) The Kitchen memorandum, heavily relied upon by the court below, was introduced in evidence to support appellees' inquiry whether the Secretary had improperly relied upon the advice of his subordinates. Finding that he had disregarded this memorandum, submitted by one who was not a witness in the proceeding and who was not familiar with its background, the court below reached the remarkable conclusion that the order should be set aside because the Secretary had *not* followed the recommendation that new evidence was necessary. (2) In the circumstances of this case the evidence supporting the 1933 order was sufficient to support the 1939 order and, even if it were not, the burden of going forward could

be assumed to rest upon the appellees. (a) The Secretary properly assumed that the existing record might be taken as satisfactory except so far as the parties wished to supplement it. In motions before him the appellees demanded an opportunity themselves to introduce evidence of changed conditions. After protracted argument on their exceptions to the findings, counsel for the Department of Agriculture concluded that it was unnecessary to introduce additional evidence. The normal presumption of regularity in men's affairs would indicate that the evidence prior to 1933 was sufficient and could properly be considered to cast upon the appellees the burden of supplementing this evidence. If the old record, supplemented by the new evidence introduced by the appellees, is insufficient to support the 1939 order of the Secretary, this objection goes to the merits and does not establish procedural irregularity. (b) Under the Packers and Stockyards Act, in contrast to public utility regulation, the reasonable rates have no necessary relationship to actual costs. *Acker* v. *United States,* 298 U. S. 426. Here, as in *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, the necessity of taking evidence as to changed conditions was simply a question for administrative determination.

D. The finding of the court below that the Secretary did not personally weigh or appraise the evidence is wholly without support in the evidence.

The Secretary, like the judges of the court below, did not personally read the extremely voluminous record. But he did read in its entirety the appellees' summary of the evidence, he went over the appellees' exceptions item by item in lengthy conferences with the trial examiner, and consulted critical portions of the actual record. He relied upon none of his assistants except the examiner. This, even if it were open to the court below to inquire into the methods by which the Secretary reached his decision, is sufficient to meet all procedural requirements, and to demonstrate that there was no perfunctory adoption of the examiner's findings.

Part Two

I

The District Court considered the merits of the case upon an erroneous notion that it was dealing with a proceeding which was no longer strictly administrative. But in truth its function in this proceeding, as in any other review under the Packers and Stockyards Act, was simply to determine whether there was substantial evidence to support the order of the Secretary. *United States* v. *Morgan,* 307 U. S. 183.

II

The appellees in the District Court attacked only two findings of the Secretary and the general finding of the court below that there was no substantial

evidence to support the findings of the Secretary presumably reflects this attack.

A. The finding of the Secretary that there are too many agencies in the Kansas City stockyard is supported by evidence which appellees seek to discredit only upon the ground that it was opinion testimony. But it was the opinion of men qualified to know the facts.

B. The findings of the Secretary as to the reasonable salesmanship cost have ample support in the evidence. Many salesmen, even with the limited volume of business available per salesman at the stockyard, exceed the annual performance of 24,000 head of cattle and calves which the Secretary found that a reasonably competent salesman could handle if there were a sufficient volume, and a number of witnesses testified that a salesman could be expected to handle at least this much. There was also reliable evidence that the stockyard had too many commission firms and too many salesmen for efficient performance. The salary found by the Secretary to be reasonable for a salesman is well above the median of salaries paid. The appellees introduced no contradictory testimony, and their exhibits were equivocal.

III

A. The Secretary correctly estimated the yield of the prescribed rates. The appellees' attack upon the revenues to be realized is based largely upon an assumption that they should continue their dis-

criminatory preference of buyers and speculators in the rates charged. But the Secretary is not obliged to establish rates so high as to permit discriminatory concessions to certain classes. In the second place, to the extent that the appellees show that the revenues exceed the cost for cattle and calves, they do not discredit the Secretary's figures for the entire livestock business, including sheep and hogs. Finally, even if the rates were applied with the discriminatory concessions used by appellees, the great majority of the firms would have revenues in excess of costs even for cattle and calves alone.

B. The court below found that the Secretary refused to allow certain costs which were properly allowable. But he *did* allow Social Security taxes. If his allowance for rate case expenses was inadequate, the margin of revenues over reasonable cost and profit is ample to absorb the deficiency.

C. The changes during the impounding period did not make the rates inadequate. While there has been a marked increase in the more costly truck-in business, and a diminution in the rail business, this has had a corresponding and compensatory effect in bringing the business within the higher rates prescribed for smaller consignments. No satisfactory evidence as to the yield of the rates during the impounding period was introduced by the appellees. In any event, the appellees' contention is not that an actual deficit

resulted, but simply that a hypothetical deficit would have resulted on the basis of the Secretary's calculations.

IV

The court below found generally that the Secretary had improperly failed to consider certain facts and circumstances. We suppose this finding reflects the appellees' argument. It is without support.

A. The only evidence which was excluded by the examiner was the reports of two cooperative commission companies, on the ground that the Act made them confidential. We think the ruling was correct and in any event was not prejudicial, particularly since the appellees offered none of their own reports in evidence. The other occasion discussed by the court below was a ruling made in 1932 and had reference neither to the 1939 order nor even to that of 1933, but instead to the first order entered in 1932.

B. The Secretary properly considered the other items of evidence which the appellees, simply on the ground that their contentions were not adopted, urge that the Secretary failed to consider: (1) The increase in livestock prices was not relevant. (2) The increase in costs of living required no modification in the order, especially since salaries had in fact declined. (3) The decrease in the number of firms and salesmen during the impounding period was not shown to be an

abnormal turn-over and in any event was irrelevant to what constituted reasonable rates in an overmanned market. (4) The seasonality of the receipts did not require the Secretary to prescribe rates based upon the maintenance of a peak force throughout the year. (5) The business-getting and maintenance expenses were properly treated by the Secretary. Appellees did not succeed in establishing that diminished expenditures for this purpose were attributable to the 1933 rate order. Indeed, the diminished volume of business reflects basic changes in the stockyard industry.

ARGUMENT

In our view the decision of the District Court was based upon its conclusion that the proceedings before the Secretary had been irregularly conducted. The error in this conclusion is emphasized by the fact that the procedure followed by the court below in conducting the inquiry into the administrative process appears to have exceeded all limits of judicial propriety. These considerations will be discussed in Part One of this brief, and we believe that the decision here will be found to turn upon those issues. However, the findings and conclusions of the court go beyond the procedural issues discussed in the opinions and rule upon the validity of the Secretary's order on its merits. It is doubtful that the decision on the merits would have been made independently of the decision upon the pro-

cedure. But the decision on the merits is cast in terms of an independent ruling and that issue is, therefore, covered in Part Two of this brief.

Before proceeding to the argument on the specific issues, we wish to point out that the decree below should be reversed, regardless of what view is taken as to the correctness of the decision. If the decision is regarded as invalidating the Secretary's order on procedural grounds alone, the decree ordering distribution of the funds to appellees must be reversed because there has been no valid determination that the Secretary's rates were unreasonable. *United States* v. *Morgan,* 307 U. S. 183. On the other hand, if the decision is construed as holding that the rates prescribed by the Secretary are not reasonable rates, the decree must nevertheless be reversed because the court did not even purport to decide that the rates actually collected by appellees were the reasonable rates. It is settled that the "Reasonableness of the rates was not established by the filed schedules" (*id.,* at 197). To permit the refunding of the impounded moneys to appellees under either of these circumstances would amount to giving them moneys collected from the rate payers without there ever having been a determination by any competent authority that appellees were entitled to charge the filed rates. In other words, appellees have again obtained a decision from the court below under which they would receive a windfall by default.

PART ONE

I

THE DISTRICT COURT ERRED IN PERMITTING THE SECRETARY TO BE CALLED AND EXAMINED AS A WITNESS

The action of the District Court in compelling the Secretary of Agriculture to testify at the trial, and to produce on demand inter-office communications received by him from his subordinates during the course of the administrative proceedings, raises a question of fundamental and far-reaching importance in the field of administrative law.[1] Quite

[1] General objection was made at the trial below, and error has been generally assigned here (R. 354–358), to the action of the court in permitting the Secretary to be called as a witness and to be questioned by appellees on direct examination (Assignment of Error No. 30), and in requiring the Secretary to produce, for introduction by appellees in evidence, communications received by the Secretary from his assistants and subordinates after the oral argument before him and prior to his issuance of the order of June 20, 1939 (Assignment of Error No. 33, R. 381–382). Also, specific objection was made at the trial, and error has been specifically assigned here, to the action of the court in permitting the Secretary to be questioned as to whether or not he had read and examined certain evidence and exhibits presented in the administrative hearings (Assignment of Error No. 31, R. 387–388, 393, 395–397, 399–402); as to whether or not he had received any communications from his assistants and subordinates after the oral argument but prior to the issuance of the order (Assignment of Error No. 32, R. 388, 390, 403–404); as to whether or not he had read such communications (Assignment of Error No. 34, R. 390, 403–404); as to whether or not, after the oral argument, he had conferred with the trial examiner, and as to what communications he received from the trial examiner in the course of such con-

apart from its general importance, this issue is practically determinative of this appeal because the more important findings underlying the conclusion of the court below depend exclusively upon the evidence elicited from the Secretary (*e. g.*, Findings of Fact Nos. 21, 22, 23, and 25; R. 337, 342–343).

At the outset of this discussion, it is important to understand the grounds upon which appellees claimed the right to examine the Secretary and to inquire into his conduct of the case. Appellees attacked the order of June 20, 1939, on many points but the only basis for their demand to examine the Secretary were the following allegations in their return to the order to show cause (R. 303): (1) the determinations were made by persons other than the Secretary (R. 305); (2) they were the result of prejudgment by these persons without fair consideration of the evidence (R. 305); (3) the Secretary after oral argument was believed to have received memoranda and suggestions from the trial examiner and other persons connected with the Solicitor's Office, which were not communicated to the appellees (R. 307–308); (4) the Secretary, failing to consider the evidence, ac-

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ferences (Assignment of Error No. 35, R. 394, 397–398); as to whether or not he had personally written certain portions of the order of June 20, 1939, and, if not, as to who did write them (Assignment of Error No. 36, R. 387, 391–392, 401); and, finally, in permitting the Secretary to be questioned as to his mental processes in the consideration of certain factors entering into his decision of the issues before him (Assignment of Error No. 37, R. 395, 398–402, 407–408).

cepted recommendations from persons associated with those prosecuting the inquiry as to the manner of changing the order so as to meet appellees' exceptions without changing the result (R. 307); and (5) the Secretary directed these persons to rewrite certain sections of the order (R. 308).

Each of the allegations which appellees made to justify their demand to examine the Secretary went beyond the record of the administrative proceeding and raised matters intended to impeach that record and the recitations of the order, notwithstanding the fact that the record was in all respects regular on its face.[2] On the basis of these allegations, appellees assert the right (1) to inquire into each step which the Secretary took within the walls of his own office in making his determination and particularly the steps he took to obtain assistance and information from his subordinates and (2) to inquire into the mental processes by which the Secretary himself reached the determination which is embodied in the order.

The appellants moved to strike those paragraphs from the return (R. 320). The District Court denied the motion and, when the case came on for trial, permitted appellees to call the Secretary as a

[2] The first fifteen paragraphs of the Secretary's order of June 20, 1939, recite the entire administrative procedure in this case (R. 197-212). The recital shows that beginning with the reopening of the proceedings appellees were, at every stage at which it was possible, apprised of the Government's claims and accorded ample opportunity to meet them with evidence and argument.

witness in their behalf upon the issues sought thus to be raised, taking under advisement appellants' objections to the court's action in this respect (R. 380–382).

The majority of the District Court not only overruled appellants' objections but relied heavily on the Secretary's testimony and on the contents of the inter-office communications received by the Secretary from his subordinates. The majority deals with its power to inquire into the Secretary's processes of decision only by the statement that the reports of subordinates are not privileged when there is a charge that a fair hearing has been denied (R. 1314). Judge Otis, dissenting, pertinently observed (R. 1330–1331):

> The Secretary's duty to afford a "full hearing" is the same, not in details, but in fundamentals, as that of a judge to whom a case is presented in court * * *. Has anyone ever heard of a court of appeals, reviewing such a case, entertaining arguments that the trial judge did not read and consider the evidence? Certainly not. The presumption is conclusive that the trial judges have done their duty.

Judge Otis might have added that in a suit involving the judgment of a judicial tribunal the testimony of the trial judge as to what matters he had considered or passed on would be "obviously incompetent." *Fayerweather* v. *Ritch,* 195 U. S. 276, 306–307. This prohibition against inquiry into the

operations of the judicial process is deeply rooted in public policy. In discussing another phase of this rule, this Court, in *Crescent Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141, said (p. 159–160):

> It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle.

It would, accordingly, be a shocking departure from accepted standards of propriety if a trial judge were forced to take the witness stand and defend himself against imputations of misconduct and demerit, testify as to the quantity and quality of his consideration of the evidence, and produce for reexamination the memoranda of his law clerk. The record now at hand, however, is built upon just such a proceeding, with the Secretary of Agriculture in the role of witness defending himself against charges and imputations of hidden misconduct in holding a hearing which this Court has characterized as having "a quality resembling that of a judicial proceeding." *Morgan* v. *United States,* 298 U. S. 468, 480.

There is no justification in law or fact for denying to the action of a quasi judicial tribunal the same protection that has always been accorded to the action of courts. Admittedly there is no difference in fundamentals between the full hearing to which one is traditionally entitled in the courts and the full hearing which one is guaranteed by the terms of the Packers and Stockyards Act. *Morgan* v. *United States, supra.* We do not suggest that administrative procedure should be free from any of the familiar safeguards which control the judicial process. We do earnestly urge, however, that the reason for the rule against prying back of the record into the judicial process of decision compels the enforcement of a similar rule in respect to the administrative process.

There is no decision of this Court which supports appellees' claim that administrative tribunals are not to be granted the same protection as judicial tribunals. On the contrary, long established precedents in the field of administrative law plainly hold that the court below, in yielding to appellees' demands that the Secretary be compelled to submit to their examination, exceeded its authority and committed prejudicial error.[8]

[8] Even in cases where allegations have been made that consideration was accorded by the administrative officer to matters not a part of the evidence adduced at the hearing, *cf. Interstate Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292, 305, 306; *West Ohio Gas Co.* v. *Public Utilities Commission* (No.

In *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, suits had been brought by the railway company to void tax assessments, the bills charging that the board of assessors "coerced by political clamor and its fears" had arbitrarily predetermined the values to be assessed against the railway properties and had then pretended to fix the values by calculation and that the assessments so made were fraudulent. The lower court dismissed the bills after a hearing on the merits. This Court, through Mr. Justice Holmes, said (p. 593):

> When we turn to the evidence there is equal ground for criticism. The members of the Board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the Board were not entitled to the possibly higher immunities

1), 294 U. S. 63, 68, the courts have not allowed the claim to be sustained by an inquiry into the mental processes which induced the administrative conclusions. On the contrary, the claim of matters *dehors* the record was established by tangible evidence patent on the face of the order itself, not by a process of subjective analysis. See *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 287–289; *Ohio Bell Tel. Co.* v. *Comm'n, supra; West Ohio Gas Co.* v. *Commission* (No. 1), *supra; The New England Divisions Case*, 261 U. S. 184, 198, note 19; *Chicago Junction Case*, 264 U. S. 258, 265 (where lack of supporting evidence was admitted by motion).

> of a judge. *Duke of Buccleuch* v. *Metropolitan Board of Works,* L. R. 5 H. L. 418, 433. * * *[4]

The *Babcock* decision is applicable *a fortiori* to the present case. Certainly the proceeding before the Secretary partakes more closely of the nature of a judicial proceeding than does the action of a board of tax assessors and it was the analogy of the tax assessors' function to the judicial process which was the *ratio decidendi* of the *Babcock* case.

Appellees gain no comfort from the first and second opinions of this Court in this case (298 U. S. 468; 304 U. S. 1). So far as concerns the second opinion, it is enough that there the Secretary had voluntarily submitted to examination as a witness in his own behalf and this Court declared that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing

[4] The opinion continues:

"* * * Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. *Mattox* v. *United States*, 146 U. S. 140. So, as to arbitrators. *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, 457, 462. Similar reasoning was applied to a judge in *Fayerweather* v. *Ritch*, 195 U. S. 276, 306, 307. A multitude of cases will be found collected in 4 Wigmore, Evidence, §§ 2348, 2349. All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

which the law required" (304 U. S. 1, 18). As to the first opinion, it must be considered in the light of the fact that the record there, unlike the present record, was not regular on its face. The circumstance which, as the Court stated at the outset of its opinion, gave rise to the problem presented at that time was the fact that the officer who had signed the findings and order was not, as the record showed, the officer who had heard either the evidence or the argument. *Morgan* v. *United States*, 298 U. S. 468, 478–479. The holding on that record that all questions "touching the regularity" of the proceedings before the Secretary were open to review (*id.*, at 477), cannot by any device be distorted into a universal ruling that in all proceedings under the Packers and Stockyards Act the record and order of the Secretary are subject to impeachment.

No subsequent decision of this Court has dealt with the issue raised by appellees, but in several cases the question has been squarely presented to five Circuit Courts of Appeal. In every instance it has been held, on the basis of the first and second *Morgan* opinions, that it was not permissible to go behind an administrative record regular on its face and by allegations similar to those here involved attack the sufficiency of the hearing.

Such a ruling was made in *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6), certiorari denied, 308 U. S. 568; and in *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. (2d) 953

(C. C. A. 8), which we should have thought binding on the court below. See also *Ford Motor Company* v. *National Labor Relations Board,* 99 F. (2d) 1003 (C. C. A. 6); *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 16 (C. C. A. 9); *Inland Steel Co.* v. *National Labor Relations Board,* 105 F. (2d) 246 (C. C. A. 7); *National Labor Relations Board* v. *Botany Worsted Mills,* 106 F. (2d) 263 (C. C. A. 3); *National Labor Relations Board* v. *Lane Cotton Mills,* 108 F. (2d) 568 (C. C. A. 5th).[5]

The dangers created by any rule of law which permits inquiry into the intramural procedures of administrative agencies are well illustrated by the present case. It appeared at the trial that in fact none of the Secretary's subordinates gave him any assistance of any kind except John C. Brooke, the examiner who heard the evidence. The propriety

[5] The *Lane Cotton Mills* case, when measured against the decision of the same court in *National Labor Relations Board* v. *Cherry Cotton Mills,* 98 F. (2d) 444, offers a pointed illustration of the difference between proceedings regular on their face and those which are not. The court in the *Lane Cotton Mills* case said (108 F. (2d) at 570):

"* * * Under our former decision, we may inquire as to the source of an order that purports to come from the Board, where the record discloses no evidence that it did, and the circumstances indicate that it did not; but where, as here, there have been oral arguments and briefs before the Board, and it appears that the case was withdrawn from this court in order that the Board might act, there is no circumstance which would warrant our going behind the recitation of the order that it is made upon a consideration of the entire record in the proceeding."

of this assistance is beyond question.* The Secretary was required, however, to produce a memorandum which had been given to him by C. W. Kitchen, the associate chief of the Bureau of Animal Industry (R. 390–391, 449–452). Over appellants' objection, this memorandum was introduced in evidence (R. 404) and appears to have supplied the majority of the court below with the principal basis for their conclusion that the order was invalid. Mr. Kitchen had not heard any of the evidence in the case, he had no official duties to perform in connection with the administrative hearing, and by his own admission he was not fully informed as to the background of the proceeding (R. 449). Furthermore, the Secretary himself testified that the memorandum did not in any way serve as a basis for, or influence, his decision (R. 405). The majority of the District Court appeared to believe (erroneously, in our opinion) that Mr. Kitchen's memorandum was a criticism of the Secretary's findings and order. But discussion of this belief is superfluous; the real point is that Mr. Kitchen's opinions are quite irrelevant. As a result of the erroneous procedure followed by the court below, an inquiry which was initiated on the ground that appellees were entitled to discover whether the Secretary received and relied upon unauthorized communications from his assistants has, by startling paradox, developed into an argument that the

* See pp. 75–76, 79–80, *infra*.

Secretary's order should be set aside because he *did not* accept the advice of an assistant who had not heard any of the evidence.

If this practice were to become general, judicial review of administrative orders will assume a novel and extraordinary scope; the courts will do much more than determine whether the hearing was fair and the findings supported by evidence; the courts will be required to survey the views of all of the subordinate employees and officers of the administrative body, to decide whether these views are in agreement and, if not, to decide which of the conflicting views should be given decisive weight. It seems unnecessary to engage in extended criticism of this result.

We submit, then, that the integrity and value of the administrative system as an instrumentality of orderly government depends upon the freedom of administrative officers from inquisitions such as was permitted by the court below.

Appellees will doubtless contend that even though as a general rule the law will not sanction the kind of inquiry into the administrative process which was permitted here, there were exceptional circumstances in this case which remove it from the scope of that rule. This argument must necessarily rest either on the ground (1) that the allegations of the appellees' pleading were such as to make this case an exception to the rule or (2) that the nature of the proceeding made the general rule inapplicable.

Appellees' pleadings supply no basis for a devi-

ation from the general rule against inquiry into the administrative process. The allegation that the Secretary made his determination "without dispassionate or fair consideration or appraisal of the evidence" and that the Secretary failed and refused "to weigh dispassionately the evidence" are obviously designed to raise precisely the kind of issue as to the Secretary's mental processes which any general rule against inquiry into the administrative processes is intended to foreclose. The allegations that the Secretary consulted with his subordinates in the absence of appellees and accepted recommendations from them as to the form and content of his findings likewise fail to raise any issue which would justify treating this case as *sui generis*. Every administrative agency relies upon the assistance of its subordinate officers and employees; the legality and propriety of this assistance were expressly recognized by this Court upon the first appeal of this case. *Morgan* v. *United States*, 298 U. S. 468, 481. Appellees have alleged nothing in this respect which could not be alleged by any litigant of sufficient hardihood who was dissatisfied with an administrative ruling or order. If such allegations are an adequate foundation for the kind of interrogation permitted by the court below, no general rule against inquiry into the administrative process can possess any vitality whatsoever.

So far as concerns the second point, no ground exists for distinguishing between this proceeding and any other administrative proceeding. The

Secretary was acting pursuant to powers conferred by Section 309 (c) of the Packers and Stockyards Act. It is immaterial that the Secretary was making a determination as to the reasonableness of rates which should have been charged for a period in the past and not making an order fixing reasonable rates for the future. The same kind of administrative power is exercised in both instances. No basis exists for arguing that one kind of judicial review should be applied to a determination as to the past and a different kind as to an order directing conduct for the future. Nor is it material that the Secretary's determination was to provide a basis for action by the district court in distributing the impounding fund. Even though it may be admitted that the function to be performed by the court on the basis of the Secretary's determination was somewhat different from the function which it would perform in the case of an order making rates for the future, it is not a necessary consequence of this admission that some novel and extraordinary rule of judicial review should be applied to the Secretary's determination. It is apparent from the opinion of this Court on the last appeal, *United States* v. *Morgan,* 307 U. S. 183, that any determination which the Secretary might make under Section 309 (c) shares the characteristics of all other administrative determinations, is entitled to the same weight, and is subject to the same kind of judicial review. Thus it is significant that this court said expressly that the Secretary's determi-

nation, "if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody" (*id.*, at 198). We submit that, at least by inference, this statement negatives any argument that the Secretary's determination was peculiar or unique in such a way as to subject it to a kind of examination or scrutiny not permitted in the case of any other administrative action.

II

THE SECRETARY PROPERLY INITIATED AND CONDUCTED THE REOPENED PROCEEDINGS

The appellees have urged and the court below has held that the reopened proceedings were initiated and conducted by the Secretary in a manner which disregarded the previous opinions of this Court in this case and which ignored controlling principles of constitutional or statutory procedure. Both the argument of appellees and the decision of the majority below may fairly be characterized as proceeding upon the hypothesis that the Secretary acting under the Packers and Stockyards Act is an "alien intruder" into the field of government administration (*United States* v. *Morgan*, 307 U. S. 183, 191), deserving of unrestrained discipline if pretext can be found. The following discussion of the specific charges levelled by the court below shows that the imagined pretext is wholly wanting.

A. THE APPELLEES WERE HEARD BEFORE AN IMPARTIAL TRIBUNAL

The majority of the District Court held that the Secretary of Agriculture "was not an impartial trier of the facts" (Finding of Fact No. 27, R. 343) and that the trial examiner, "being under the domination and control of the Secretary and having been publicly instructed by him as to the result he desired, was not an impartial trier of the facts [even if the examiner had been authorized to so act, which he was not [1]] (Finding of Fact No. 28, R. 338). The majority concluded as a matter of law that the Secretary denied to appellees "the full and fair hearing before an impartial tribunal as a trier of the facts contemplated and required by law" (Conclusion of Law No. 4, R. 344).

The finding as to the trial examiner's lack of impartiality is not amplified or explained in other findings or in the opinions of the majority of the court below.[2] Since, in the view of the majority below, the examiner's disqualification arose simply from his being under the domination and control of the Secretary it is unnecessary to discuss the two findings separately.

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[1] We shall not separately discuss the concluding clause of finding No. 28, which we have enclosed in brackets, because we have been unable to ascertain what it means.

[2] At the outset of the reopened proceeding appellees asked that an examiner be appointed to take evidence (R. 419), and they made no objection to the examiner designated until after the hearings had concluded and the examiner's report had been filed (R. 430–431).

The finding and conclusion as to the Secretary's lack of impartiality appear from the opinions below to be based upon an affidavit of bias and prejudice which appellees filed before the Secretary shortly after the administrative proceeding was reopened (R. 411–413). The affidavit recited that on May 8, 1938, the Secretary had written a letter to the New York Times concerning the administrative and judicial proceedings in this case and charged (R. 412–413:[3] that the Secretary without appraising the evidence, had in this letter adjudged the issues against the appellees, and was disqualified to act "By reason of such highly publicised prejudgment" and by reason of his relationship as Secretary of Agriculture to the raisers of livestock.

Appellees' attack is directly chiefly to the statement in the Secretary's letter (See Reproduction of Exhibits, pp. 382, 390) that the effect of this Court's decision invalidating the 1933 rate order was to give the market agencies the fund impounded in the District Court which "rightfully" belonged to the farmers from whom it had been collected.

[3] The relevant portion of the letter is: "But if the Solicitor of the preceding administration could have had some sense of prophetic warning he could have saved to the farmers of the Kansas City area at least $700,000 which rightfully belongs to them and which will now go to the commission men and their attorneys." (See Reproduction of Exhibits, p. 390.)

On the basis of this letter and the extravagant characterization of its contents by appellees, Judge Van Valkenburgh, on behalf of the majority, said (R. 1310):

> * * * In this letter the Secretary displays impatient disapproval of the Supreme Court's action, and, in effect, brings an appeal from it to the bar of public opinion. He insists, despite that ruling, that this impounded fund (which he mistakenly places at $700,000) rightfully belongs to the farmers, of which, he says, they had been deprived "by some finely drawn rules of judicial procedure."[4] The letter emphasizes his fixed opinion that this money should be distributed to the shippers of livestock, notwithstanding he interpreted the Supreme Court's decree to the contrary. By this letter he publicly announced his determination and prejudgment of what the result of any future proceeding should be.[5]

1. *There Was No Prejudgment.*—The statements made by the Secretary are not reasonably susceptible of the interpretation which the District Court has placed on them. Particularly does this seem so in view of the explanation of the state-

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[4] We do not know the source of the quoted phrase. It does not appear in the Secretary's letter, as the context would have it appear.

[5] This paragraph from the court's opinion appears in substantially the same form in Finding 10 (R. 340–341).

ments which the Secretary made in his opinion overruling the affidavit of bias and prejudice and the motion that he disqualify himself (R. 423). There he said in effect that the statements had expressed his first impression of the decision of this Court invalidating the 1933 rate order; that he had said the money "rightfully" belonged to the farmers because he believed his 1933 order was correct and the only court which had passed on its merits had so held; but that nothing which he said meant or was intended to mean that his mind would not be open upon a reconsideration of his previous action to the influence of new evidence and argument. In the light of this frank explanation by the Secretary of his position it seems that the dissenting judge entertained a far more temperate and reasonable view of the Secretary's letter (R. 1329).

It seems unnecessary to elaborate the rather evident proposition that the Secretary's letters did not show a prejudgment of the issues. His original order had twice been upheld on the merits by the court below. This Court had not disturbed that decision but had held the order invalid for procedural irregularity, and had admonished the Secretary as to the necessity of maintaining proper procedural standards (304 U. S., at 17). It was at that time by no means clear that disposition of the merits would not follow the procedural decision. In this context, the statement of the Secretary that

the impounded funds "rightfully" belonged to the customers of the appellees was a wholly natural phrase by which to point out the additional aspects of the litigation which should be considered together with the widely publicized procedural admonition.

Read in the context of the times, the Secretary's letter showed an adherence to his original views on the merits that the order established reasonable rates, measured by the existing record and arguments, but did not suggest in any manner that his mind would be closed to the force of new evidence and new arguments.

We shall, in the succeeding paragraphs, urge that there would as a matter of law be no disqualification even had there been a prejudgment. But we cannot emphasize too strongly that the argument reflects only the lawyer's caution. There was in truth no prejudgment and there is in fact no occasion to demonstrate the irrelevance of the extravagant premise of the appellees and the majority below that the Secretary had prejudged the issues.

2. *There Would Be No Disqualification.*—The opinions below neglect to disclose whether appellees' right to an impartial tribunal was deemed to rest on the due process clause or was merely a necessary implication from the statute, both of which

propositions were urged by appellees.[6] But a prejudgment of the issues would raise a disqualification under neither provision.

The first point is plainly settled by the opinion of this Court in *Tumey* v. *Ohio*, 273 U. S. 510. In that case a State statute setting up a judicial system in which pecuniary interest on the part of the tribunal was inescapably present was held to violate the due process clause of the Fourteenth Amendment. But the Court said in that case (273 U. S., at page 523):

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.

Congress has not undertaken specifically to legislate on the subject of impartiality in an administrative, quasi-judicial, or quasi-legislative tribunal. However, we gladly assume that the "full hearing" prescribed by Section 310 serves to hold the administrative tribunal to the same criteria of impartiality as Congress and custom has established for the judiciary. Under the stand-

[6] In an effort to clarify the issue, appellants requested the court below to make a direct ruling as to whether the Secretary, by reason of the state of mind which was attributed to him, should have disqualified himself in the reopened proceeding (R. 333). Without comment the majority ignored that request.

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ards of judicial impartiality, it is apparent that in the circumstances of this case the Secretary was not disqualified.

Disqualification of a trial judge for bias is governed by Section 21 of the Judicial Code (28 U. S. C. Sec. 25). That section provides that whenever any party to a proceeding, civil or criminal, files an affidavit that the trial judge "has a personal bias or prejudice either against him or in favor of any opposite party," such judge shall proceed no further. One of the earliest constructions of the provision was in *Henry* v. *Speer,* 201 Fed. 869 (C. C. A. 5, 1913). The case arose upon a petition for mandamus to compel District Judge Speer to transmit to the Senior Circuit Judge an affidavit of bias and prejudice which had been filed against him by the petitioner. The affidavit recited that petitioner's case was pending before Judge Speer on the defendant's exceptions to the master's report. Petitioner charged that he could not get an impartial trial because (p. 870):

> * * * the Honorable Emery Speer rendered, or rather delivered to the newspapers an opinion relative to the above-entitled cause, * * * in which practically every issue is prejudged and determined by the said judge. This opinion, as deponent is informed and believes, was written before the above-named case had been assigned for trial, without the report of the master, or the evidence in said cause having been read by the judge and before any argument of counsel.

> Deponent avers that in his judgment and belief this opinion very clearly indicates the bias and prejudice of the said judge against deponents' right to recover, and precludes for him the possibility of a fair and impartial trial.

Thus, in judicial setting, we find a parallel to the most extreme charges of the affidavit filed by appellees in this case.[7] In holding that mandamus should be denied, the Court of Appeals pointed out (pp. 871–872) that Section 21 required a personal bias against the suitor, and held that because the statute was liable to abuse, strict compliance was required. The court said (p. 872):

> The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and "against deponents' right to recover." Section 21 is not intended to afford relief against this situation.

In the case at bar the appellees did not charge the Secretary with "personal" bias; instead they charged that he had prejudged the issues in the reopened proceeding. The *Speer* case and numer-

[7] It is interesting also to compare Judge Speer's opinion (191 Fed. 868) with the Secretary's opinion on motions (R. 423).

ous other decisions demonstrate that such allegations are completely inadequate to disqualify a trier of the facts on either statutory or constitutional grounds. *Ryan* v. *United States,* 99 F. (2d) 864 (C. C. A. 8); *Craven* v. *United States,* 22 F. (2d) 605 (C. C. A. 1); and see also *Ex parte Am. Steel Barrel Co.,* 230 U. S. 35; *Sacramento Suburban Fruit Lands Co.* v. *Tatham,* 40 F. (2d) 894 (C. C. A. 9); *Morse* v. *Lewis,* 54 F. (2d) 1027, 1031 (C. C. A. 4); *In re Lisman,* 89 F. (2d) 898, 899 (C. C. A. 2); *Cuddy* v. *Otis,* 33 F. (2d) 577 (C. C. A. 8); *Currin* v. *Nourse,* 74 F. (2d) 273 (C. C. A. 8).[8]

The foregoing cases do not hold and we do not suggest that a judge may always properly sit in a case upon the merits of which he has formed a settled conclusion. However, those cases plainly hold that if the court below had entertained and announced the same view which the Secretary publicly expressed, it would not have been disqualified under Section 21 of the Judicial Code to sit in judgment on the present order.

It is doubtless true that a judge who had prejudged the issues would adopt a wiser course if he were to disqualify himself. We suppose this to be the general rule, and we also are prepared to assume that the administrative tribunal should fol-

[8] For cases illustrating the type of allegations necessary to show "personal" bias, see *Berger* v. *United States,* 255 U. S. 22; *Chafin* v. *United States,* 5 F. (2d) 592 (C. C. A. 4); *Nations* v. *United States,* 14 F. (2d) 507 (C. C. A. 8).

low the same careful standards as the courts. But the judicial analogies demonstrate that, if the Secretary had prejudged the issues and still did not care to disqualify himself, the parties would have no recourse.

The sole remaining question is whether administrative tribunals are required to meet a higher standard of impartiality than judicial tribunals. Appellees must concede that Congress has established no such requirement and we submit that there is no constitutional basis for a double standard of impartiality. Certainly, the Constitution does not afford less protection from biased courts than from biased administrative tribunals. Appellees have insisted that courts of review have greater latitude to protect litigants from the partiality of trial courts than from the partiality of administrative tribunals.[9] But these considerations if they have any substance, are simply those which might move Congress in the exercise of its legislative discretion to establish different rules for determining the qualifications of judges and administrators; and this Congress has not done. Appellees are consequently left with no stronger

[9] As a practical matter, we doubt that the reviewing court is less able to guard against partiality in the administrative agency than in the lower court. It has no more room to review the jury verdict than the administrative determination. And it is not necessary to weigh the evidence to discover unfairness. See *West Ohio Gas Co.* v. *Public Utilities Commission* (No. 1), 294 U. S. 63.

support for their affidavit of bias and prejudice than they can draw by analogy from Section 21 of the Judicial Code. Since, as abundantly appears from the cases discussed above, the situation presented by the facts of this case are beyond the letter and spirit of Section 21, it follows that the lower court erred in setting aside the Secretary's order on the strength of appellees' affidavit.

B. THE PROCEEDING WAS PROPERLY REOPENED

1. *Service of 1933 Findings and Order.*—The proceeding was reopened by an order of the Secretary dated June 2, 1938, which recited briefly the prior administrative and court proceedings in the case and then stated (R. 173–174):

> Whereas, on the appeal of the market agencies, the Supreme Court held, on April 25, 1938, that the Secretary's order was invalid because the market agencies were not fairly advised of what the Government proposed to do, and were not given opportunity to be heard upon such proposals;
>
> It is therefore ordered that said proceeding be, and the same is hereby, reopened; and,
>
> It is also ordered that the "Proceedings, Findings of Fact, Conclusion and Order," as issued by the Secretary of Agriculture on June 14, 1933, be served upon said market agencies as the tentative findings of fact, conclusion and order of the Secretary of Agriculture in this proceeding; * * *

The argument of the appellees is fairly reflected in the finding made by the court below (R. 343):

> Throughout the reopened proceedings, the Secretary of Agriculture entertained the misconception that the only error found by the Supreme Court in the prior proceeding which led to the invalidation of the order issued by him therein was the failure to permit a full argument on the findings and conclusions with full understanding of the issues presented, whereas the Supreme Court had also held that such findings had been improperly made by the "active prosecutors for the Government" and had been adopted by the Secretary of Agriculture without addressing himself to the evidence in the manner required by the Packers and Stockyards Act. [Finding of Fact No. 24.]

These objections are answered by the Secretary himself. The same arguments were urged before the Secretary by a motion that he withdraw the tentative findings (R. 415–419). In his opinion of August 26, 1938, the Secretary ruled as follows (R. 428):

> The tentative findings were adopted by me after a careful study of the record and I think that at this stage the proceeding will be expedited by a consideration of these findings in light of the exceptions to them which the respondents have already filed. The findings show respondents' operations for the period just prior to the order of June

14, 1933, and will, I believe, prove very helpful as a working basis for this hearing.

On the other hand, I have never had any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933. In reopening the proceeding, I expressly gave them time in which to make any appropriate motions or objections with respect to further proceedings in this case. At the prior hearing we were obliged to consider forecasts of conditions which can now be checked in light of subsequent events. I shall accordingly designate an examiner to hear such further evidence as he may find material and relevant in regard to conditions subsequent to June 14, 1933, which affect the reasonableness of the rates to be fixed by the Secretary. The examiner will consider the tentative findings in light of the exceptions taken thereto and the new evidence adduced and may revise such findings or substitute or add such new findings as he may find necessary or appropriate. What weight will be given to the new evidence, and what to the old, must be determined as the hearing progresses. The respondents will be given an opportunity to make exceptions to such revised and new findings as the examiner may make before I hear final arguments on the case.

The Secretary's opinion, if fairly read does not mean that the tentative findings were to be taken as presumptively valid; they were merely to be taken as a convenient starting point in the reopened proceeding. The Secretary correctly understood appellees' complaint to be principally that in the former proceeding they had not, at any time prior to the issuance of the final order, been apprised of the Government's position on the record. For the purpose of eliminating a similar ground of complaint in the reopened proceeding the Secretary adopted the tentative findings as a direct and convenient means of advising appellees at the outset of the Government's position on the record as it then stood. Indeed, the tentative findings served a double function: they constituted in effect an elaborate initiating pleading and they also condensed into usable form a great mass of evidence which was relevant to the inquiry undertaken.[1]

There is, moreover, no ground for criticism that the tentative findings had originally been prepared by the so-called "active prosecutors for the Government". The Secretary said (R. 428) that he had adopted the findings after a careful study of the

[1] By taking no exception to them, appellees themselves acknowledged that many paragraphs of the present order (which are identical with the tentative findings and with the Examiner's report) correctly summarized the evidence. See Exceptions to Examiner's Report (Reproduction of Exhibits, pp. 257–382).

record, and nothing impeaches his word in this respect. Although this Court found that the order of June 14, 1933, had improperly been formulated departmentally rather than personally by the Secretary, it did not hold or intimate the belief that the Secretary inadequately understood the evidence which lay behind the findings contained in that order. On the contrary, the Court assumed that the Secretary sufficiently understood its purport. *Morgan* v. *United States,* 304 U. S. 1, 18.

The comments of the dissenting judge deserve attention. He said (R. 1330), of this "hypertechnical" contention, that it was "absurd to speak of the findings with which the Secretary began the last proceeding as 'tainted' findings," and correctly noted that this Court in its second decision condemned only the Secretary's "failure to give petitioners notice of the Findings and a chance to oppose them in argument."

We do not assert that the Secretary adopted the only acceptable procedure in serving the tentative findings as a means of continuing the investigation. We submit, however, that the procedure adopted, even if inferior to some other which might have been devised, did not result in substantial prejudice to appellees or deprive them of a full and fair hearing.

Nothing in the second *Morgan* opinion required the Secretary to abandon all that had gone before. It held his order invalid simply because of a failure

to inform appellees of the Government's position. That defect was completely cured by service of the former findings, conclusions, and orders as those proposed in the reopened proceedings.

This interpretation of the second *Morgan* opinion, adopted by the dissenting judge below, has uniformly been followed in the other courts which have considered it, including the Circuit Court of Appeals for the Eighth Circuit. *Cupples Company Manufacturers* v. *National Labor Relations Board,* 103 F. (2d) 953, 958 (C. C. A. 8); *Inland Steel Co.* v. *National Labor Relations Board,* 105 F. (2d) 246, 251 (C. C. A. 7), and *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 16, 18 (C. C. A. 9).

2. *There Was No Attempt at "Validation".*— The court below found a related flaw in the Secretary's service of the proposed findings, conclusion, and order. It found as a fact that (R. 343):

> The object of the Secretary of Agriculture throughout the reopened proceedings was to procure the validation *nunc pro tunc* of the fatally defective order of June 14, 1933. [Finding of Fact No. 23.]

This charge is contradicted by the Secretary's opinion on appellees' motions, announced on August 26, 1938. This opinion, as we have already shown (*supra,* pp. 51–52), simply accepts the earlier findings and order as a convenient starting place, and expressly directs that the examiner ap-

pointed to take further evidence should make such revision of or additions to the findings as the new evidence may show to be necessary or appropriate. In fact new evidence was taken (*infra*, pp. 62–63) and changes in the findings were made (*infra*, pp. 83–84). The accusation of the court below imputes an improper purpose to the Secretary which is without any support in the evidence and which is contradicted by the Secretary's own opinion.

C. THE INTRODUCTION OF NEW EVIDENCE

The court below seems to have felt that the failure of the Government to introduce new evidence showing the actual conditions after June 14, 1933, substantiated its conclusion that the Secretary intended only "a perfunctory argument" in order to "rehabilitate the rates prescribed as of June 14, 1933" (R. 1311). This accusation, analysis of the opinion shows, is based only upon (1) the Secretary's disregard of the Kitchen memorandum, and (2) a view that the Government was under a burden to show in detail any changes in conditions since 1933. The first point, which received the greater emphasis, shows the court below to have proceeded upon priciples which were patently wrong, and the second point at the most presents a debatable point of administrative procedure.

1. *The Kitchen Memorandum.*—The court below has found error, and indeed suggested misconduct, by the Secretary because he failed to act in accord-

ance with a memorandum submitted to him by C. W. Kitchen, Associate Chief of the Bureau of Animal Industry, on June 13, 1939 (R. 449–452), one week before the final order of the Secretary in the reopened proceedings (R. 197).

The reliance of the majority on the Kitchen memorandum is one of the most remarkable circumstances of this entire litigation. Appellees demanded that the Secretary produce that document on the sole ground that it was competent evidence as to whether or not the Secretary had received improper suggestions and recommendations from his subordinates during the course of the reopened proceeding (R. 304–305, 307–308, 390–391). The memorandum (R. 449–452) which is summarized in Judge Van Valkenburgh's opinion (R. 1311–1313), was obviously innocuous so far as that issue was concerned. Moreover, the Secretary testified that while he read Mr. Kitchen's gratuitous observations he did not change the proposed order or in any other way act in reliance upon the memorandum (R. 405).[1]

Certainly the Secretary's conduct in this respect was unimpeachable. The memorandum consisted, for the greater part, of speculation by Mr. Kitchen

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[1] On the strength of this testimony appellants moved to strike the exhibit but the court refused on the ungracious ground that circumstances might discredit the Secretary's statement (R. 406). Examination of the memorandum and the order of June 20, 1939, will show beyond question that the memorandum had no effect on the order.

upon certain considerations which he indicated would have influenced his judgment if he had been the rate maker. To the extent that the memorandum purported to set out facts Mr. Kitchen was not testifying as a witness under oath and subject to cross-examination but was merely expressing *ex parte* his views and opinions. The Secretary could not be unmindful of the admonition that "Nothing can be treated as evidence which is not introduced as such." *Morgan* v. *United States,* 298 U. S. 468, 480.

The majority below felt no such restraint in this respect. The Kitchen memorandum was demanded and its production compelled for the sole purpose of discovering whether the Secretary had received improper communications from his subordinates. When it developed that the memorandum was not material to that issue, appellees seized upon it for the sake of certain observations it contained as to whether or not the Secretary had followed the correct procedure in the reopened proceeding. With utter abandon of all rules of evidence they argued that Mr. Kitchen's statements were not only binding on the Secretary but were conclusive evidence on the point in controversy. The majority below adopted that view, and regarded the Kitchen memorandum not only as competent evidence as to the merits of the controversy but as completely dispositive evidence on almost every issue which the case presented and as sufficient ground, without more, for invalidating the Secretary's order.

The contents of the document may be divided into three categories: (a) observations bearing on the reasonableness of the Secretary's rates; (b) assertions that there were readily available data showing actual receipts for the period to which the rate order would apply; and (c) queries as to whether the Secretary had proceeded properly in failing, as Kitchen assumed, to investigate such data adequately (R. 449–452). The observations upon the reasonableness of the rates were obviously not evidence in this case. The document was not part of the administrative record but was simply the unsworn statement of one who had not been called as a witness in the administrative hearing and could not have been called as a witness at the trial. *Acker* v. *United States,* 298 U. S. 426, 434. So far as concerns the unsworn assertion that the Secretary was in a position to ascertain actual experience for a period then past, the statement must be regarded as a highly questionable proposition advanced by one who acknowledged his unfamiliarity with the background of the case.[2] And, so far as concerns the related speculation as to

[2] Mr. Kitchen began his memorandum by saying (R. 449–450): "We [meaning, presumably, himself and his staff] have read the proposed order in Docket 311, the Kansas City Commission rate case. I am not fully informed as to all the background in this long contested case. In reading the proposed order [not the record, it will be noticed] certain questions have occurred to us which we submit for consideration and without recommendation as to the action to be taken."

whether it was proper for the Secretary to pass over evidence which Mr. Kitchen apparently assumed the Secretary did not have adequately before him, that assumption presented either a question of administrative judgment for the Secretary or a question of law for the court. In neither case would the views of Mr. Kitchen ordinarily be supposed to receive weight, much less to be conclusive.

2. *Evidence as to Changed Conditions.*—The only question of any substance in this connection is whether the order of the Secretary in the reopened proceedings is invalid because the Government did not introduce evidence of actual conditions between June 14, 1933 and November 1, 1937.

(a) The Secretary, in his order reopening the proceedings, could conceivably have directed that a new record be built without reference to the earlier proceedings. This course, abandoning all the work that had gone before, would have been administrative folly. Accordingly, the Secretary properly assumed that the existing record might be taken as satisfactory except so far as the parties wished to supplement it. Thus, in final analysis, the issue is resolved into a question of whether the Secretary committed prejudicial error in shifting to appellees the burden of going forward with the evidence sooner than they would otherwise have been compelled to assume it.

The Secretary's rate order of June 14, 1933, had twice been upheld on the merits by the court below.

See *United States* v. *Morgan*, 307 U. S. 183, 188. The evidence supporting that order, covering in great detail a period of several years immediately preceding June 1933, had been summarized, analyzed, criticized, briefed, and argued by the parties many times and everyone was thoroughly familiar with it. Much of it concerned matters which had not been contested in the former proceeding; all of it was obviously pertinent to a new inquiry, the value of any part diminishing only as intervening conditions had effected material changes.

It was under these circumstances that the Secretary decided to reopen the proceeding by serving appellees with tentative findings, based only on the record as it then stood. Appellees immediately objected that the manner of reopening the proceeding deprived them of an opportunity to offer evidence concerning conditions subsequent to June 14, 1933. By affidavit it was charged that a number of substantial changes had occurred since the close of the former record, which affected both appellees' costs and the reasonableness of their rates, and as a result of which, it was claimed, the existing record was "stale, misleading, incomplete, and unsuitable for use in connection with the determination of just, reasonable, and non-discriminatory rates" (R. 421). The motion concluded with the request for the following relief (R. 419):

> * * * *respondents expressly demand an opportunity to offer* through the testimony

> of witnesses and by other proper means concerning (a) the increased cost of rendering stockyard services * * *, (b) evidence as to the decline in the revenues * * *, (c) evidence as to the increase in the value of respondents' services * * * and (d) all such further evidence material and relevant to the proceeding as may relate to the * * * respondents' operations in said * * * years [1933–1937]. [Italics added.]

As we have shown above, the Secretary's reply to these assertions was, first, that he had issued the tentative findings only because he believed they would "prove very helpful as a working basis for this hearing", and, second, that he intended to accord the parties full opportunity to develop the material facts concerning changed conditions since the close of the prior hearings (R. 427–428). Accordingly, the examiner whom the Secretary designated was directed to receive "such additional relevant and material evidence as the parties in this proceeding may desire to offer with respect to conditions subsequent to June 14, 1933" (R. 422).

When the hearings before the examiner began appellees appeared and for five and one-half days argued their exceptions to the tentative findings (T–3, pp. 1–487).[8] At the conclusion of the argu-

[8] The stenographic transcripts of the testimony in the several administrative hearings have been transmitted as original documents (see Stipulation, R. 360). The transcript in the first hearing will be cited as T–1; that in the second as T–2; and that in the reopened proceeding as T–3.

ment the examiner announced his readiness to receive evidence (R. 1241). Counsel for the Department of Agriculture stated that he did not intend to offer evidence at that time. Counsel for appellees protested this course. Counsel for the Department replied, in effect, that, in view of the argument on the exceptions, he was satisfied with the record as it stood and that since appellees had alleged drastic changes since the close of the record and had been granted leave to present evidence in substantiation thereof, he thought it proper for appellees to go forward with proof (R. 1242–1247). The examiner, over appellees' objection, refused to compel counsel for the Department to put on evidence and appellees commenced their presentation (R. 1247). Except for one minor item of evidence which the examiner excluded,[4] which we discuss later (*infra*, pp. 141–146), appellees presented all the evidence which they desired to produce bearing on conditions during the impounding period.[5] The Government offered no evidence in rebuttal (R. 1281, 429).

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[4] The respondents demanded the production from the Department of Agriculture files of the annual reports of two cooperative commission companies which were not parties to the reopened proceeding. This was refused because the reports were filed as confidential (R. 1257–1258).

[5] The majority below speaks of "the offers of proof by" the appellees (R. 1312). The inference, that appellees were denied an opportunity to prove changed conditions is wholly without support save for the single item described in the preceding footnote.

The majority of the court below, if Judge Van-Valkenburgh's opinion be the test, finds this procedure to prove conclusively that the Secretary's object was only to validate the earlier rates and constituted denial of due process of law (R. 1312–1313). It is impossible to accept that view. The issue is simply whether the burden of going forward with the evidence lay on the Government or on the appellees. A mistaken ruling on that question could not possibly be an occasion for the extravagant accusation that the Secretary, acting with an improper purpose, denied the appellees of "the fair hearing required by the due process clause before an impartial tribunal as the trier of the fact" (R. 1313).

However, in the circumstances of this case, there was ample basis for the Secretary's conclusion that appellees should assume the burden of going forward. The earlier findings and order, made after elaborate and painstaking investigations, had twice been upheld on the merits by the court below.[6] The normal presumption of regularity in the affairs of men would indicate that the findings and order would apply equally after 1933. This Court, it is true, has several times held that the regulatory body must consider the evidence of experience rather than that of forecast alone. *West Ohio Gas*

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[6] The greater portion of the findings in both the 1933 and the 1939 orders, it is to be noted, have not been challenged by exceptions of the appellees.

Co. v. *Public Utilities Commission* (No. 2), 294 U. S. 79, 82; *Atchison Ry. Co.* v. *United States*, 284 U. S. 248, 262; *Southwestern Tel. Co.* v. *Pub. Ser. Comm.*, 262 U. S. 276, 287–288. But it has never held that the regulatory agency must itself retrace its studies through the events of the recent years. If the normal expectation, that the conditions of the past will obtain in subsequent years, should be thought to be misfounded, the very purpose of the full hearing is to permit the objecting parties to introduce their evidence.

Here the Secretary seems in his order reopening the proceedings to have contemplated simply a reargument, without taking new evidence (R. 173–174). The appellees promptly and vigorously protested. But they did not then insist that the duty of accumulating new evidence lay upon the Secretary; they demanded, instead, that *they* be allowed to put in their evidence (*supra*, pp. 61–62). The Secretary was persuaded, and designated a trial examiner to take whatever new evidence the parties offered. Thus, the appellees received not only all that they were entitled to but all that they had asked.[7]

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[7] It is true that counsel for the Department consistently objected to introduction of the evidence as to changed conditions (R. 1246). This may have been irritating, but since the evidence *was* introduced and considered by the Secretary, the appellees cannot object to any misapprehension entertained by counsel.

The history of this case does not support the belief that the appellees would have failed to produce any item of evidence which they felt lent probative force to their contentions. We submit that the only conclusion which can be drawn from appellees' failure to produce from their own experience the information which audits of the later years' operations would have revealed is that appellees preferred to rest upon technical objections to the procedure rather than to attempt to support by affirmative evidence the claim that there had been substantial change in conditions which made the great volume of evidence previously taken inapplicable.

The new evidence introduced by the appellees was in fact considered by the Secretary. He made numerous changes from his original findings which are to be accounted for by the new evidence (see *infra*, pp. 83–84).

In short, the appellees asked an opportunity to introduce evidence as to changed conditions. The Secretary granted this request, and considered the evidence introduced by the appellees, Thereafter the appellees charged that there was a denial of due process because the Secretary did not himself undertake a complete survey of the changed conditions, and the court below joined in this extraordinary accusation. It needs, we think, no argument to demonstrate that the "full hearing" required by Section 310 contemplates an opportunity for either party to introduce its evidence,

and not an opportunity for compelling one party to introduce evidence satisfactory to its opponent.

The Secretary must, of course, have evidence to support his order. But if he was satisfied that the data used in 1933 was sufficiently accurate for the subsequent years, the procedural burden of necessity shifted to the appellees. Whether or not the 1933 data was in fact substantial evidence to support the order for the years 1933–1937 presents a question on the merits and is discussed below. It is sufficient here that appellees were given a full hearing and that they complain only that they preferred the Secretary to introduce the new evidence rather than to undertake themselves to take advantage of the opportunity given them to do so.

(b) The substance of appellees' contention seems to be that since the Secretary, in the former proceedings, had made audits of appellees' business as a basis of his judgment, it was indispensable to a full and fair hearing that he repeat that operation in the reopened proceeding. They argued that the Secretary should have prepared an audit of each market agency's business for every year from 1933 to 1937 in order to determine the actual individual financial experience of each firm, and should then have prepared a schedule of rates which would have produced to the penny the costs and profits which he found to be reasonable.

If actual experienced costs were the sole guide to reasonable costs, or if the Secretary were required here to provide a fixed rate of return on

capital investment, as in public utility rate cases, (cf. *West Ohio Gas Co.* v. *Public Utilities Commission* (No. 2), 294 U. S. 79) it might conceivably be argued as an abstract matter that the failure of the record to contain data indispensable to the essential computations constituted denial of a full hearing and due process. But there is no tenable basis for such an argument under the circumstances of this case.

The Secretary of Agriculture in fixing commission rates under the Packers and Stockyards Act is required to establish *reasonable rates.* This Court recognized in *Acker* v. *United States,* 298 U. S. 426, that reasonable rates have no necessary relationship to actual costs. As was there pointed out, the Secretary is not bound to accept the actual financial experience of a particular firm or of all the firms as the sole guide to reasonableness (*id.,* at 429). Inasmuch as actual costs are not the necessary criterion of reasonable rates, the question as to what evidence of costs is adequate for determining reasonable rates is one for administrative judgment.

It is the practice, upon commencing a new livestock commission rate investigation, for the Secretary to prepare an audit of the business of the firms involved, on the basis of some prior representative year or period. It is prepared and used on the necessary assumption of continuity and stability. To the extent that conditions remain essentially unchanged the evidence of prior years is obviously the

substantial equivalent of any similar evidence which might be retaken for subsequent years.

Under these circumstances the sufficiency of the audits already in the record was a question for adminstrative determination, the decision of which raises no issue as to the procedural regularity of the hearing and presents to this Court no unusual problem of judicial review. We submit that this proposition was conclusively settled on strikingly similar facts, in *Illinois Commerce Commission* v. *United States,* 292 U. S. 474. In that case the Interstate Commerce Commission ordered intrastate switching rates in the Chicago Switching District to be raised to the level of previously established interstate switching rates. The interstate rates had been prescribed in an order dated July 31, 1931, and were based in large part on detailed cost data for selected periods in 1926–1927. In November, 1931, the Commission reopened the proceeding for further hearing with respect to the relationship of intrastate and interstate rates, and its final report in the reopened proceeding, placing intrastate rates on the same level as existing interstate rates, was dated July 3, 1933. Before the hearings were closed certain parties, including the Illinois Commerce Commission, one of the appellants, requested that a further and more detailed cost study be made, which would be more representative of current conditions. The Inter-

state Commerce Commission denied the request. This Court said (pp. 480–481):

> The principal contention is that conditions since 1927 had so changed that a new study should have been made. * * * The Commission decided that, on the record before it, it was able to consider the effect of the factors suggested by appellants and that a new cost study was unnecessary.
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> * * * * *
>
> Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts.

The court below, ignoring the rule of the *Illinois Commerce Commission* case, gave no recognition to the fact that the Secretary had found the evidence before him to be adequate as a basis of judgment. Instead, the court undertook to make an independent determination of this question and substituted its judgment for that of the Secretary. The result reached is not to be condoned because the court apparently conceived the Secretary's "duty" in this respect to be bound up in some way with a procedurally regular hearing.

D. THE SECRETARY PERSONALLY WEIGHED AND APPRAISED THE EVIDENCE

The District Court found (R. 337):

> The Secretary of Agriculture did not personally weigh or appraise the evidence either in its original form or as sifted and analyzed by his subordinates, but in determining upon the findings issued by him on June 20, 1939, adopted as his own findings in the tentative report made by the Trial Examiner as heretofore stated, which said findings were substantially the same as those made by the 'active prosecutors for the Government' in the original proceeding. [Finding No. 22.]

No conclusion of law definitely relies upon this finding as a ground of invalidity of the Secretary's order, but the opinion of the majority of the court below leaves no doubt that the finding is to be regarded as stating a procedural defect sufficient without more to vitiate the order entered in the reopened proceeding.[1]

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[1] In this connection Judge Van Valkenburgh said (R. 1313):

"The Secretary seems to regard the permission to obtain the aid of assistants in the department, who may 'sift and analyze' evidence taken by an examiner, to confer upon him the right without more to accept and adopt the views of such subordinates, who are, in most cases, as in this, the actual prosecutors against the market agencies. There must, however, be a hearing in a substantial sense. Sifting and analyzing by others is not enough. 'To give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies

The court below, as we have shown, had no power to probe the Secretary's conduct in making his decision. But even if its examination had been authorized, the ruling on this issue reveals a thorough misconception on the part of the majority below of the scope of the Secretary's rights and of the court's duties; it is traceable, apparently, to a misunderstanding of this Court's earlier opinions in this case. The majority speaks, for example, of "the permission to obtain the aid of assistants," as if the "practicable administrative procedure in obtaining the aid of assistants" (298 U. S., at 481) were a matter of grace accorded by courts to administrative agencies. The majority also quotes from the first *Morgan* opinion to the effect that the substance of a hearing requires the officer who makes the determinations to consider the evidence supporting them, without recognizing that this Court was there addressing itself exclusively to the principal issue then presented but not now involved, i. e., whether the statutory duty to accord appellees a full hearing was personal or departmental.

Discussion of these matters would be superfluous were it not that the court baldly asserted in its find-

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them.' [*Morgan* v. *United States*, 298 U. S. 468, 481–482.] * * *"

and concluded that (R. 1315):

"Throughout this reopened proceeding the Secretary relied upon the appraisal of evidence by his subordinates. That was true at the former hearing, and the resulting order was held to be invalid, largely on that ground. * * *"

ings, first, that the Secretary "did not personally weigh or appraise the evidence" and, second, that he "adopted as his own" the findings of the trial examiner (R. 337). In view of the complete lack of evidentiary findings to support this ultimate finding, the only possible conclusion is that it is the result of the erroneous interpretation of this Court's earlier opinions which is manifest in the opinions of the majority.

1. *The Secretary Appraised the Evidence.*—The majority has attempted to condemn the Secretary's conduct of the reopened proceeding by the use of language found in the first *Morgan* opinion when this Court decided that the Secretary's duty was personal and not departmental. It has ignored not only the clear implication of the holding of that opinion, that evidence taken by an examiner may be "sifted and analyzed by competent subordinates" (p. 481), but likewise the fact that in the second *Morgan* opinion this Court, in the light of the Secretary's deposition, found "no occasion to discuss the extent to which the Secretary examined the evidence" and instead assumed that he "sufficiently understood its purport." 304 U. S., at 18.

The dissenting opinion of Judge Otis contains illuminating comment upon this ruling. He said (R. 1331–1332):

> This court theretofore (before the first Supreme Court decision in this case) passed upon the same record as was presented to the Secretary. Our duty, as we thought it might

be, was identical, in the respect now considered, with that of the Secretary, that is, to determine from the weight of the evidence whether the Secretary's judgment was right or wrong. A record made up of thousands of pages and of hundreds of exhibits was handed to the court. Did any one of the judges read all that record or examine all those exhibits?

What the judges of this court did (and what, I doubt not, the justices of the Supreme Court will do when this case reaches them) was to read and hear the summaries of the evidence which the parties made in their written and oral arguments (perhaps occasionally "dipping into the transcript") and to hear and consider their respective contentions. That was a "full hearing," a judicial hearing.

* * * If the petitioners did not like the summaries prepared by the Secretary's subordinates (or if some of the testimony was not summarized by them), is there any suggestion that counsel for petitioners were prevented from submitting their own summaries? * * * Must he, the Secretary of Agriculture, the head of a great executive department of the Government, must he not only check up on his own subordinates to ascertain whether they have imposed upon him but must he also check the summaries of counsel for petitioners to make certain that they did not understate their case? * * *.

When we turn to the record we find that the Secretary's consideration of the evidence amply met the requirements of a full hearing as defined by this Court in its prior decisions in this case.

The appellees presented to the court below the exceptions which they had filed to the examiner's report. This, they declared, presented a fair summary of the evidence from their point of view.[2] It was eighty-four pages long and was filled with verbatim quotations from the record, numerous tables drawn from exhibits, and appellees' own characterization and interpretation of all the evidence of any consequence bearing upon their contentions.[3] *This document the Secretary read in its entirety* (R. 407).

But the Secretary did not stop with reading what appellees claimed was a fair summary of the evidence. He supplemented that knowledge with information received during lengthy conferences with the examiner (R. 394). During these conferences, the Secretary, after reading in their entirety appellees' exceptions and proposed findings, went over them, *item by item,* with the examiner on the basis of a detailed summary and analysis of those exceptions and proposed findings prepared by the examiner (R. 394). The Secretary, although without

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[2] Appellees' brief on merits, pp. 14–15.

[3] See Exceptions to the Examiner's Report, Reproduction of Exhibits, pp. 255–382.

specific recollection, assumed that the examiner had reviewed for his benefit the salient evidence bearing on controverted matters (R. 394). Such a review of the evidence was entirely proper. It is, indeed, difficult to see how the Secretary could otherwise obtain the full benefit of the trial examiner's experience in the hearing. It obviously constituted the analysis of the evidence which this Court in the first *Morgan* opinion said a competent subordinate may make for the Secretary's assistance.

But the Secretary's consideration of the case did not stop here. He supplemented appellees' "fair summary of the evidence" and the examiner's summary and analysis of the evidence and issues with a personal examination of portions of the transcript and of certain exhibits. He did not, it is true, consult each of the numerous citations which appellees made in support of their exceptions and proposed findings (R. 387–388). However, the Secretary consulted the narrative transcript "to some extent"; he consulted some of the exhibits underlying certain paragraphs of the order; and he examined some of the exhibits introduced at the reopened proceedings (R. 393–394, 397, 408). In view of the fair summarization of all the evidence which the Secretary had available, it was certainly unnecessary for him to do more than consult, in the context, critical passages of testimony or appraise, at first hand, the more significant exhibits. To re-

quire more would be to shackle the process of administrative decision in a manner which would be unthinkable if applied to a court.[4] Approval of the decision below would paralyze administrative decision and substitute a bootless pursuit of *minutiae* for the informed judgment which any tribunal is supposed to exercise.

In the light of this uncontradicted evidence of the painstaking care with which the Secretary explored the fundamentals of the case, it is more than a little difficult to discover a basis in the record for the finding of the courts below that the Secretary did not personally weigh or appraise the evidence either in its original form or as shifted and analyzed by his subordinates.[5] We are forced to suppose that the sweeping condemnation of this finding is simply an expression of the majority's disapproval of the Secretary's action in accepting the examiner's judgment as to the value of the testimony of one witness, Bates. The only statement made by

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[4] It is in this connection relevant that the transcript of testimony accumulated during the three administrative hearings totals 10,644 typewritten pages. This, together with the considerably more voluminous matter introduced as exhibits, occupy more than 12 cubic feet in the office of the Clerk of this Court.

[5] It is interesting to compare the thoroughness of the Secretary's examination with the practice of the eight state supreme courts which responded to a questionnaire designed to ascertain the extent to which the judges plunged into the records of the cases before them. See *Journal of the American Judicature Society*, August, 1925, p. 50.

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the majority in support of its conclusion is the following passage from Judge Van Valkenburgh's opinion (R. 1313):

> The following statement is typical of the manner in which he examined and appraised the testimony tendered by petitioners [appellees] in support of their proposed findings and their exceptions to the Master's [Examiner's] report:
>
> "It is my recollection that Mr. Brooke's [the examiner] conclusion in hearing Mr. Bates' testimony was not such that he felt his testimony had any—that great validity should be attached to his testimony. I accepted Mr. Brooke's judgment in that respect."
>
> So it was generally that Mr. Brooke, not the Secretary, appraised the testimony offered.

The characterization of the Secretary's statement as being typical of the manner in which he considered appellees' exceptions and proposed findings is wholly without support in the record. On the contrary, the Secretary's remark is the only one of its kind in his entire testimony. If it may be said to show that the examiner "appraised the testimony" in this instance, it certainly cannot be said to do so generally.[6]

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[6] So far as concerns the testimony of Bates the Secretary's action, if error at all, was demonstrably harmless. Examination of that witness' testimony (R. 1260–1271) will vindicate the examiner's judgment.

We submit, however, that no ground for invalidating the Secretary's order would be established if the remark in fact were typical. This Court certainly did not intend to speak idle words when it said that evidence may be taken by an examiner and that evidence thus taken may be sifted and analyzed by competent subordinates. To hold that the Secretary may properly employ the services of an examiner means that the Secretary need not himself hear any part of the evidence. To hold that the evidence taken by the examiner may be sifted and analyzed by competent subordinates means that the Secretary need not read any part of the original transcript for the purpose of separating wheat from chaff but may rely upon competent assistants to perform that task. The opinion below says that sifting and analyzing by others "is not enough." In the context the ambiguous declaration seems to mean that the Secretary may not avail himself of the analytical views of a competent subordinate as to the weight of a particular witness' testimony but, presumably, must read the testimony himself.

In the present case the Secretary relied on none of his assistants except the examiner, who was, of course, perfectly situated to express an opinion as to the weight to be given to the testimony of the witnesses.[7] We perceive no reason in law or fact

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[7] Appellees have not been consistent in this litigation in their attitude toward the use of a trial examiner. On the

why the Secretary was not justified in accepting the examiner's opinion in this respect.[8] Certainly "analyzing" testimony contemplates drawing a conclusion as to its weight, just as "sifting" it envisions the possibility that nothing of pertinence will be found.

2. *Adoption of the Examiner's Findings.*—The complaint by the majority of the court below that the Secretary adopted as his own the findings of

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second appeal to this Court, *Morgan* v. *United States*, 304 U. S. 1, the appellees objected because the Secretary in making his first order had not consulted Mr. Brooke. Thus, on p. 78 of their brief on that appeal (No. 581, 1937 Term), they pointed out that although Mr. Brooke "was the only member of the Department who, during the course of the proceedings, exercised quasi-judicial functions" and was the only member of the Department connected with the case "who could possibly be assumed to have an unbiased view of the weight to be given to the testimony by the different witnesses or of the weight to be given to the several parts of the testimony bearing upon the ultimate determination of the controversial questions of fact to which the findings relate", he took no part in the preparation of the findings and was not consulted by the Secretary. It seems fair to say that in the reopened administrative hearing, the Secretary took advantage of the services of the examiner in precisely the way the appellees have hitherto contended he should.

[8] It seems needless to point out that the master's report in an equity suit not infrequently contains the master's comments as to the demeanor of the witnesses, and his views as to the weight to which the testimony is entitled. It is not conceivable that appellees or the majority below would find a denial of due process in the fact that the chancellor, who did not see or hear the witnesses, accepted the views of the master who did.

the master is completely answered by any of several considerations.

In the first place, as we have pointed out above, the administrative record in the reopened proceeding shows on its face that the Secretary personally accorded to appellees every procedural right essential to a full hearing. From that fact alone, we submit, there arose by operation of law a conclusive presumption of regular and honest action on the part of the Secretary. *Crescent Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141. In the former appeals herein the facts were that the Secretary clearly regarded the duty to give appellees a full hearing as a departmental, not a personal, duty, and, conformably with that view, attached his signature to an order containing findings prepared and approved by others. The condemnation by this Court of the Secretary's action in adopting the findings thus prepared must be considered against that background and cannot in reason be taken to mean that regardless of the regularity of the record the authorship of the findings is always open to inquiry.

Here again, we submit, there is no difference in fundamentals between the judicial and the administrative processes. It is quite true that comparison of the Secretary's order with the examiner's report will disclose substantial identity between them. This Court knows that in practice trial judges frequently adopt in toto the report of a

master or the findings proposed by the prevailing party just as in practice the final order of an administrative agency is often substantially the same as the examiner's report and recommendations. It has never been thought, however, that a trial judge abandons the judicial function by adopting a sequence of words which adequately expresses his views, merely because they may be the words of the master or of counsel. The law makes them the judge's own if he adopts them as his own, and it invests his action with a presumption of regularity which forecloses any question in this regard. Where, as here, the administrative record is thoroughly regular on its face, we submit that the Secretary equally with the trial judge is entitled to the protection which that presumption affords.

In the second place, even if it were proper for the court below to permit the Secretary to be questioned as to who prepared the findings appearing in the order of June 20, 1939, the answers which he gave completely refute the court's implication that the present order of the Secretary represents a departmental rather than a personal decision of the case. In response to a series of questions as to how he arrived at the findings and conclusions set out in the order of June 20, 1939, the Secretary said (R. 407–408):

> I would mean to tell the Court this, that in my own independent judgment after reading the proposed findings of the re-

> spondents [appellees], which in a large measure are not matters of arithmetical fact deduced from the transcript or from the Government exhibit, I arrived at the conclusion that in the main the recommendations as prepared by Examiner Brooke was the Order I desired to find rather than the Order as suggested or the recommendations brought forward by Mr. Gage or by the respondents. It would be a long story indeed to indicate why I preferred one over the other.

This testimony shows that the Secretary "adopted" the findings prepared by the examiner only in the sense that having read both appellees' and the examiner's proposed findings he decided, upon his own independent judgment, that in the main his views were better expressed by the examiner's findings, than by those which appellees proposed.

In the third place, the Secretary demonstrably did not adopt as his own, and without change, the examiner's findings. They were adopted only "in the main". Comparison of the Secretary's order with the examiner's report will disclose that in thirty-three paragraphs the Secretary made changes in or additions to the examiner's report. These changes varied in consequence, of course. Some were minor changes, made for the purpose of clarification or to conform the finding more ac-

curately to the facts.[9] Others related to more controversial matters and were made largely as the result of appellees' exceptions: as to economic changes since 1929,[10] as to salesmanship and other costs,[11] and as to certain costs not covered into the per-head unit costs.[12]

The Secretary, of course, did not perform the physical operation of making these changes, but left the mechanical details to the examiner. It is not open to doubt, however, that the Secretary directed and was responsible for the changes. In a communication to the Secretary dated May 1, 1939 (Petitioner's Ex. 12, R. 452) the examiner said:

> Attached is an order in this case drafted in accordance with your instructions to me and in accordance with the decision reached by you.

That plain statement by the examiner cannot be controverted; it is appellees' own evidence. It shows beyond all dispute that the Secretary did not "adopt" the examiner's findings in the sense in which the majority below obviously used that word, but reached his own independent conclusion as the trier of the facts.

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[9] E. g., Paragraphs 15–a, 15–dd, 21, 24, 70, 93, 94, 98, 99, 101, 104, and 114 (R. 207, 210–211, 215, 231, 246, 248–249, 253).

[10] Paragraphs 108, 109, 110, 111, 112 (R. 251–252).

[11] Paragraphs 139, 140–a, 140–b, 141, 142, 143, 148–a, 148–b 165, and 172 (R. 264–277, 285–286, 296, 298).

[12] Paragraph 163–a (R. 294–296).

Part Two

The remainder of this brief will be devoted to a discussion of the validity of the Secretary's order on its merits. As we have said, we believe that there is grave doubt as to whether the court below made a real effort to determine that issue in the sense of giving consideration to the question whether, assuming the Secretary might rely upon the type of evidence before him, that evidence was adequate to support his conclusion. The failure of the majority to discuss that issue in their opinion strongly suggests that it was not decided with care. The inclusion in the findings of three unelaborated paragraphs apparently holding the Secretary's order to be invalid on its merits may be explained, we believe, on the ground that the majority below, concluding that the Secretary had proceeded improperly, adopted appellees' proposed findings on all issues in the case. Any other explanation is squarely met by the fact that, as pointed out by Judge Otis (R. 1324–1325):

> Twice this court has held, as I have noted (and the Supreme Court emphatically called attention to the fact in the third Morgan opinion—307 U. S. 1. c. 188), that an order of the Secretary, identical with the order now under review, was supported by substantial evidence. Indeed, as also I have noted, this court went further and held the order was sustained by the weight of the

evidence. But exactly the same evidence (and a little additional evidence) is before the court now as was before it on the first and second hearings. With the same evidence and the same order again before the court how can we say that the order, which we have hitherto said was supported by the weight of the evidence, is not supported by any evidence?

I

THE DISTRICT COURT PROCEEDED UPON AN ERRONEOUS VIEW AS TO THE NATURE OF THIS PROCEEDING AND AS TO ITS FUNCTION IN THE PREMISES

On the last appeal in this case two questions were presented for decision—*first,* whether the Secretary of Agriculture had authority under the Packers and Stockyards Act to reopen the administrative proceeding in which the order of June 14, 1933, had been issued and, after hearing, promulgate rates which would be applicable to the impounding period and, *second,* if the Secretary had such statutory power, what action the District Court should take with respect to the impounded fund (a) pending the Secretary's determination and (b) on the basis of the Secretary's order. This Court held that the Secretary had full power under Section 309 (c) of the Act to institute on his own motion an inquiry into the reasonableness of the rates in effect during the impounding period and to determine and promulgate the rates he found reasonable not-

withstanding the period involved antedated the order. It pointed out that the "sole limitation upon his power, prescribed by § 309 (c), is that upon an inquiry instituted by him he may not order the payment of money." *United States* v. *Morgan,* 307 U. S. 183, 192.

This Court held that it was the duty of the District Court, pending the administrative determination "to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime." *Id.* p. 198. In prescribing the course to be followed by the court below after the Secretary had concluded the proceeding and issued his order determining the reasonable rates, this Court said (p. 198):

> His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. * * * The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will hav the appropriate basis for its action and will be able to make its order of distribution accordingly.

From the Court's last decision two conclusions are inescapable: (1) The reopened proceeding instituted by the Secretary was strictly an administrative matter under the Packers and Stockyards Act; and (2) judicial review of the order issued by the Secretary was to be subject to the limitations applicable generally to the review of administrative action. In disregard of these obvious propositions the District Court adopted and entered as a conclusion of law the statement that (R. 344):

> This proceeding is no longer strictly an administrative matter under the Packers and Stockyards Act since the order of the Secretary under review determines rates for a past period rather than for the future [Conclusion of Law No. 3].

Related to the foregoing conclusion, and reflecting the District Court's notion as to its function in reviewing and giving effect to the Secretary's order, are the following conclusions of law (R. 344):

> The main purpose of the hearings before the Secretary upon which said order of June 20, 1939, was issued was to make findings and to issue an order for the purpose of assisting the Court in making equitable disposition of the impounded fund, and the burden of making findings adequately supported by evidence and a valid order providing for such disposition of said funds was upon the Secretary [Conclusion of Law No. 9].

> The burden of making a determination which would equitably support a distribution of the impounded funds and the burden of finding the rates contained in the tariffs filed by the petitioner market agencies to be unreasonable was upon the Secretary of Agriculture, and he failed to sustain the aforesaid burden [Conclusion of Law No. 7].

We do not deny that the burden of making a valid order and of making findings adequately supported by the evidence was on the Secretary in this proceeding, in the sense that any rate order issued by the Secretary must be sustained by the evidence and be valid before it can be upheld. But we deny the implications of the court's conclusions and its assertion that the Secretary failed to sustain the burden imposed upon him.

When the court's conclusions of law are read together and in the light of the majority opinions it is apparent that the majority utterly misconceived its function in the premises. It recognized no limitation on the scope of its review of the Secretary's order. Whether or not, as the dissenting judge declared (R. 1322–1323) the action was based on antipathy to the administrative process, the fact remains that the majority made no attempt to determine, within the limits prescribed by numerous decisions of this Court, whether the Secretary's findings were supported by evidence. On the contrary, the issue which appellants were compelled to meet was predicated upon a flat denial by the majority

below of the very proposition which this Court had already affirmed, namely, that the proceeding before the District Court involved an administrative order reviewable only within the usual limits.

We are confident that the Secretary's order, procedurally and on the merits, could meet even the test which the majority below devised. However, in the following sections of this brief we shall discuss the facts and the law only in terms of the issue which the record properly presented.

II

THE FINDINGS CONTAINED IN THE ORDER OF JUNE 20, 1939, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The District Court found as a fact (Finding of Fact No. 29, R. 343) that—

> The findings contained in the order issued by the Secretary of Agriculture on June 20, 1939, are not supported by substantial evidence.

The Court concluded as a matter of law (Conclusion of Law No. 5, R. 338) that—

> The order of the Secretary dated June 20, 1939, is unreasonable and is without evidentiary support.

It is apparent, as we have explained, from the other findings of fact and from the opinions of the majority that the Secretary's order was set aside principally on procedural grounds. But the ultimate finding and conclusion quoted above com-

pels us to consider the question whether the order of June 20, 1939, is sustained by the evidence.

On the first and second appeals in this case appellees made an extensive and elaborate attack upon the findings contained in the order of June 14, 1933. In the court below, out of one hundred and thirty-four pages of brief on the merits attacking the present order, appellees devoted only twelve pages to the proposition that "Basic findings and determinations made are not supported by substantial evidence.[1] They attacked only two findings: first, that there were too many agencies in business at the Kansas City market and, second, that an efficient salesman can sell 24,000 head of cattle and calves a year. In the absence of any specific indication by the court below as to the ground of its decision, we are forced to assume that the decision below directly reflects the contentions advanced by appellees, and we shall accordingly discuss these two points.

A. THE FINDING THAT THERE ARE TOO MANY AGENCIES

Appellees did not deny that there was testimony in the record to support the Secretary's conclusion that there were too many agencies on the market. Instead they contended that it was without probative value; that it was only "worthless opinion testimony"; "that in a matter of this kind, such conclusions [i. e., the witnesses' opinions]

[1] Appellees' brief on merits, pp. 62–74.

cannot bolster the conclusion which must be reached by the authority invested by law with the right to make determinations." Such opinions, they asserted, "do not constitute substantial evidence."[2]

We shall not discuss here the evidence supporting the Secretary's finding since it is in part the same evidence which we shall set out at some length in the suceeding section. It is sufficient to point out that appellees have failed to distinguish between expert testimony and opinion testimony as to facts, as their reliance on *Raladam Co.* v. *Federal Trade Commission,* 42 F. (2d) 430, conclusively shows.[3] The witnesses who testified as to the conditions existing on the Kansas City market were unquestionably qualified by experience and observation to form an opinion and as we shall later show (*infra,* pp. 103–107), their opinions were fully supported by the evidentiary facts. We submit that it was not error for the Secretary to receive and use such opinions as evidence bearing on the questions to be determined. *John Bene & Sons, Inc.* v. *Federal Trade Commission,* 299 Fed.

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[2] Appellees' brief on merits, pp. 62–64.

[3] In the *Raladam* case the question under investigation was whether or not a proprietary thyroid extract, known as Marmola, widely advertised and taken as a weight reducer, was "safe" for general consumption without the supervision of a physician. The record disclosed a wide divergence of expert medical testimony which, the court held, related to scientific opinion and not to a matter of fact.

468; *Moy Said Ching* v. *Tillinghast*, 21 F. (2d) 810; *Raladam Co.* v. *Federal Trade Commission*, 42 F. (2d) 430, 434.

B. THE FINDINGS AS TO REASONABLE SALESMANSHIP COSTS

Throughout this proceeding appellees have argued that the Secretary's findings as to the number of head of livestock of each class that a good salesman might reasonably expect to sell, if market conditions were such that he could get the livestock to sell, are unsupported by any competent evidence. In their return to the order to show cause in the present case, appellees merely incorporated by reference the allegations of Section V of their original bills, which related to these findings in the 1933 order (R. 5–9, 309).

Appellees' argument from the beginning has been based on two erroneous and unjustified assumptions—the first that the performance figure selected by the Secretary should represent the actual experience on the Kansas City market, and the second that the finding as to reasonable performance is based only on opinion evidence. Both of these assumptions, we believe, have been discredited by the opinion of this Court in *Acker v. United States*, 298 U. S. 426.

The Secretary, in trying to find a reasonable year's performance for a salesman or buyer[4] re-

[4] In the former order, as in the present one, the rates prescribed as reasonable apply both to selling and buying. In

ceiving a sufficient volume of livestock to sell or buy, was merely trying to discover a reasonable performance figure to associate with a reasonable salary figure for the purpose of establishing an equation that could be solved to obtain the reasonable per-head cost for these functions. The Secretary did not attempt to say that every salesman or buyer or any salesman or buyer should sell or buy any particular amount of livestock during the year. Neither did the Secretary attempt to say what salary should be paid to any salesman or buyer. But the Secretary did say that if a salesman or buyer was to receive the salary found by him to be reasonable, then in covering that charge into the rates it should be spread over the number of head which he found to represent a reasonable performance. This obviously leaves the door open to the commission firms to pay any salary they choose for any standard performance which they find satisfactory. Consequently, actual performance figures in no way detract from the

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the former order, however, the Secretary made no specific findings as to buyer performance and appellees brought forth the erroneous contention that a buyer is able to and does transact business with much greater rapidity and in higher volume than a salesman. (See Exceptions to Examiner's Report, Reproduction of Exhibits.) In the present order (par. 140–a, R. 271–273) the Secretary demonstrates the untenability of appellees' contentions. Throughout the argument above we deal with the facts in terms of both salesmen and buyers although we may occasionally refer to the subject as "salesmanship performance."

validity of the Secretary's findings but instead constitute part of the evidence supporting these findings.

In the 1933 order the Secretary adopted 29,000 head of cattle and calves as a reasonable performance figure to associate with a salary of $4,000. The result was a unit salesmanship cost, to be covered into the rates, of $.1379 (R. 83). In the present order the Secretary, after reviewing all the evidence and appellees' various contentions, concluded that during the period covered by the order it was reasonable to associate the selling and buying of 24,000 head of cattle and calves with an annual salary of $3,600.[5] This results in a unit cost of $.15 (R. 277).

In making his determinations in both cases the Secretary was unable to obtain from the commission firms exact information as to the actual sales performance of individual salesmen because the records which they furnish to the Secretary do not reveal this information and appellees have always contended that such information is not available. But the total volume of each class of livestock

[5] In the 1933 order the sale of 250,000 sheep was associated with a salary of $3,500 and the sale of 85,000 hogs with $3,000 (R. 83). These findings and conclusions have not been modified in the present order (R. 277). Since the bulk of appellees' argument has always centered about the findings as to cattle and calves we shall simplify the discussion by concentrating upon them.

handled by each firm and the number of persons acting as salesmen and buyers in each firm are disclosed, and on the basis of these figures the average performance per individual can readily be computed. In paragraph 140 of the order (R. 269–270) appear tables so computed, showing the average number of head, per salesman and buyer, of cattle and calves sold and bought by the salesmen and buyers of the various firms in the years 1929 and 1931. It will be seen that performance ranged from 24,912 head to 3,149 head in 1929 and from 27,791 to 2,397 in 1931. It must be borne in mind, however, that these figures are only an *average*. Obviously it cannot be assumed that each salesman in a firm handled an equal amount of livestock; consequently it is a necessary conclusion from these computations that even under the present volume of business available per man, it is not infrequent for salesmen to exceed the performance of 24,000 head adopted by the Secretary as reasonable.

In further substantiation of the Secretary's conclusion that a good salesman or buyer may reasonably be expected to sell or buy 24,000 head of cattle or calves in a year are the tables appearing in paragraph 140–b of the order (R. 273–275). As an appendix to their brief in this Court on the second appeal, appellees computed and listed the average salesmanship performance per salesman for 32 of the largest firms (see discussion thereof in

paragraph 140–a, R. 271–273).[6] There had been much argument to the effect that salesmanship and other costs are seriously affected by the seasonal nature of the business at Kansas City, October being the peak month.[7] As to 18 of the 32 firms listed by appellees, the Secretary found in the record information as to the volume of cattle and calves bought and sold by them in October 1931. Knowing the total number of head bought and sold and the number of salesmen and buyers, the Secretary was able to find the average performance per man in October and to equate this performance to an annual basis. This calculation shows on the basis of actual performance that if the salesmen and buyers of these 18 firms had the cattle and calves to sell they could average from 49,620 to 7,608 head a year. In eight of the eighteen firms the salesmen and buyers would substantially exceed the 24,000 head performance which the Secretary found reasonable and in two of the remaining firms the performance *on the average* would be above 23,500 (Order, par. 140–a, R. 271–273). The Secretary did not view this evidence as conclusive, but correctly observed that

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[6] This appendix was introduced before the Secretary in the reopened proceeding as part of appellees' exceptions to the tentative findings (R. 422).

[7] Appellees had erroneously contended that the commission firms were compelled to employ extra salesmen during the period of peak receipts. The record shows the facts to be otherwise. See Order, par. 140–b (R. 273–275).

"the experience of the firms during the season of heavy runs and the relative activity of some of the firms during the peak period shed some light on their potential capacity" (Order, par. 140–b, R. 274).

Evidence of potential capacity and of a reasonable year's performance comes from other sources also. The performance figures selected by the Secretary are approximately 850 cars of cattle and calves, 1,000 cars of sheep, and 1,133 cars of hogs. Mr. W. S. Angle, manager of the Producers Commission Association, a cooperative market agency at Kansas City, testified:[8]

> Q. Now, considering all those things * * * taking into consideration that there are peak periods in the year that you

[8] This witness was manager of one of the four largest commission firms at the Kansas City market. He testified that he had been associated with the livestock industry practically all of his life and had specialized in agricultural work at Missouri University. (R. 573–575). Certainly he was capable of judging the reasonable performance for a good salesman and his testimony clearly shows that he understood the matter as to which he was testifying and took into consideration all pertinent facts in giving his answers. A perusal of the subsequent cross-examination by appellees' counsel (R. 582, et seq.), shows that counsel was unsuccessful in attempting to break down the force of the witness' testimony. When the witness showed a disposition to testify to his knowledge of actual individual performances of salesmen at the market, counsel insisted on holding him to average salesman performance for his firm (R. 583). If this witness had not meant exactly what he said, the fact would certainly have been developed in the course of the cross-examination.

> cannot get them evenly distributed throughout the year and that you cannot get them evenly distributed throughout the week; considering * * * present conditions of an annual basis at Kansas City, and expressing it in terms of carloads—would you say that if a good cattle salesman had that many cattle to sell he could dispose of 1,500 carloads in a year and do it as it should be done?
>
> A. Yes, sir.
>
> Q. Do you think he could dispose of any more than that number, Mr. Angle?
>
> A. Yes; I do [R. 578–580].

The witness, on being asked whether or not a butcher cattle salesman could handle as many as 1,500 cars a year, replied:

> Taking the butcher cattle as they come on our market, carloads and mixed lots of butcher cattle, I would say "yes" (R. 581).

Mr. W. B. Ecton, a cattle salesman for the Producers Commission Association, testified as to 1929 as follows:[9]

> I cannot give you any estimate of the number of cars of cattle I have sold this

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[9] Appellees have attacked Mr. Ecton's testimony on the ground that the salesmen of the firm which employed him had an average salesmanship performance of 432 cars in 1929 and that consequently the witness had not attained the performance figure to which he testified. But the average of all the salesmen of the firm throws no light on Mr. Ecton's individual performance. Furthermore, Mr. Ecton's testimony can be taken as indicating that the firm did not receive a sufficient volume to enable its salesmen to exercise their full ability.

> year. * * * We have had days in which I have sold as many as 25 cars of cattle. * * * Taking the market as it is, and considering how the cattle come, a salesman could sell more than 1,500 cars of cattle in a year. I think he could sell more than 2,000 cars a year. I would be perfectly safe in saying he could sell 3,000 cars a year. I am referring mostly to the class of cattle that I handle. In the feeder class, a man could sell more than that because they come in big bunches. I don't know how many a regular butcher man could handle. I don't think he could sell as many as 2,000 the way the shipments come to this market. The butcher cattle take more work and more time than the other kinds of cattle. (R. 601–602.)
>
> * * * * * * * *
>
> * * * There is no doubt in my mind but that a cattle salesman could handle 3,000 cars in a year. I have never had a chance to handle that many on this market, but I feel sure that it could be done (R. 606–607).

Mr. John W. Murphy, a cattle salesman for the Bowles Livestock Commission Company, testified that although he did not know how many cars of cattle he handled in 1929 or 1930, he thought that he had, in his experience, handled as many as 1,500 cars of cattle in a year and it was his opinion that under existing conditions at the Kansas City market he could handle the equivalent of 1,500 cars of cattle if he had them to sell (R. 566–568).

The six cattle and calf salesmen of Swift & Henry Livestock Commission Company sold 138,133 cattle and calves in 1931. Mr. J. C. Swift, one of the owners of this firm, testified that the firm could easily handle one-third more business (R. 1198–1199). If the volume of cattle and calves which that firm received in 1931 were increased by one-third and apportioned equally among the six salesmen, their average performance would have been more than 30,000 head per man.

It should be noted that the witnesses whose testimony has been described above expressed the opinion that a competent salesman, if he had enough volume to make it possible for him to operate in a reasonably efficient manner, could not merely equal the performance figures selected by the Secretary, but could exceed them. This testimony as to salesmanship performance was not contradicted by any witness called by appellees at the former hearings. More significantly, it was not contradicted by any witness at the reopened proceeding, despite the vigorous attack which appellees have made upon this testimony throughout this litigation.

Appellees have assailed this testimony as to salesmanship performance on the ground that it is opinion evidence. This description may be admitted without destroying the evidence or impugning its accuracy or force in any respect. It *is* opinion evidence, but it represents the opinions of men

acquainted with the Kansas City market and well qualified to give expert testimony with respect to salesmanship performance when there are enough cattle to sell. On the face of the record it would obviously have been improper for the Secretary to accept without qualification, and as the sole basis for determining reasonable costs, evidence as to the average salesmanship performance of all salesmen on the market. Under the circumstances, the testimony of these witnesses was more valuable than any evidence as to the average performance under the existing volume of cattle available per salesman.

Reduced to its essentials, appellees' complaint seems to be that the Secretary should have ignored all the evidence before him except the evidence as to actual cost. This contention and the assumption upon which it rests disregard the evidence before the Secretary.

There were too many market agencies operating on the Kansas City market, either for the good of the agencies or the good of the producers. Owners and representatives of the various commission firms testified that they were all involved in a constant struggle to increase their volume of business or at least to keep that volume from shrinking. Despite appellees' unfounded assertion that the firms employ extra men at peak seasons (see Order, par. 140–b, R. 273–275), the evidence disclosed that the market agencies were not operating at a max-

imum capacity or maximum efficiency at any time.

Mr. J. C. Swift, president of Swift & Henry Livestock Commission Company, one of the larger firms operating at the Kansas City market, stated:

> The total volume of business at the central markets shows a constant decrease, and this naturally increases the competition for that business open to several markets. My firm struggles to maintain its volume and uses every legitimate effort to do so. Volume is our only salvation. The diminishing volume affects our gross returns materially [R. 1189].

Another witness testified that in 1930 he "had the organization to handle the 6,000 head of cattle which (he) did not get" (R. 871). Mr. J. C. Swift, of Swift & Henry Livestock Commission Company, testified that with a normal flow of business his firm could handle one-third more volume with practically no added expense (R. 1198–1199). Mr. Frank Witherspoon, of the Witherspoon Livestock Commission Company, stated that if his firm had received the volume which it formerly received it would have been able to reduce units costs (R. 1090) and that an increased volume would have enabled the firm to increase salaries (R. 1098).

Witnesses connected with the production end of the livestock industry were decidedly of the opinion that there were too many commission firms operating on the Kansas City market from the

standpoint of benefit and efficient service to the producers.

Mr. J. H. Mercer, Livestock Commissioner for the State of Kansas, testified at the first hearing before the Secretary that:

> If there were a reduction in the number of firms and people who are engaged in the livestock commission business at Kansas City, it is my opinion that they could still handle the business and very much better than it is now being handled. I would say that at least 30 or 40 firms could handle the business [R. 523].

At the second hearing the witness reiterated his former views, and stated that there should be (R. 994–995)—

> reduction in cost, cooperation, working more closely together, consolidation of the business, elimination of unnecessary concerns.

Mr. J. W. Hudelson, a livestock producer and a director of the Kansas Livestock Association, who participated in the appraisal of owners' services made by appellees, testified (R. 804–805) on cross-examination:

> I read Mr. Mercer's testimony and agree with the most of it. * * * one-third of people could do the work, with the exception of a few days in the fall of the year when there are heavy runs. I would say half could do the business that is done at the stockyards here.

Mr. F. E. Mollin, secretary of the American National Livestock Association, an association of producers, testified (R. 498, 499–500):

> I took occasion to look up the number of commission firms on this market and I note that they have been increasing since 1922, while the receipts have been decreasing, according to the yard company's report.
>
> * * * * * *
>
> We think that the nature of your business here has been such that it has attracted more men than are needed to conduct the service and that makes it tough for all of you. I think the only practical way to regulate the number involved in the business is through establishing reasonable rates based on good service and efficiently operated firms.

An examination of the selling organization of a few typical firms indicates there is a wide variation in average volume of business handled by the salesmen of the different firms.[10] These widely

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[10] Firm No. 12 employed four full-time salesmen and one full-time buyer to handle the equivalent of 2,450 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 13). Firm No. 15 carried three full-time salesmen to handle 702 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 21). Firm No. 16 had five full-time salesmen handling 988 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 23). Firm No. 29 had three full-time salesmen and one full-time buyer handling 962 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 39). Firm No. 35 had eight full-time salesmen and one full-time buyer handling 2,418 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 46–47). Firm No. 46 had eight full-time salesmen and four full-time

varying performance figures, when contrasted with the uncontradicted testimony above set out as to the performance which an efficient salesman could reasonably be expected to attain, demonstrate better than any other kind of proof the obviously overmanned condition of the market and the impossibility of attaining reasonable salesmanship performance.

The foregoing analysis of the evidence indicates that many firms were maintaining unnecessarily large selling organizations. One would normally think that the number of salesmen in a firm would be held to a minimum by a provident management of the business. However, the conditions existing in the Kansas City market and the peculiar nature of the business of the market agencies operate in the opposite direction. The business is one of rendering personal service and requires a very small outlay of capital. Furthermore, a person with a following among shippers can expect a certain volume of business from that following at little or no cost. Therefore, there is a strong

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buyers handling 5,641 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 56–57). Firm No. 54 had the equivalent of eight and a half full-time salesmen and two full-time buyers to handle 8,544 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 69–70). Firm No. 59 had ten full-time salesmen and the equivalent of 3¼ buyers handling 7,022 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, pp. 76–77). Firm No. 77 had four full-time salesmen handling 906 cars of livestock (Gov. Ex. 115, p. 57; Gov. Ex. 115B, p. 110).

incentive for such a person to go into the business as an independent market agency; or if he is an employed salesman, there is a strong incentive for his employer to retain him in his employment for fear of losing the business which the salesman personally controls. As a result, so far as the rates will permit, there is a constant tendency for more persons to be engaged in salesmanship than are reasonably needed to perform the work."[11]

It is these conditions which the Secretary had in mind when he classified salesmanship costs as a kind of costs which conditions in the business tend to increase. As the record shows (R. 518), market agencies in some cases hire additional salesmen who have a following in order to increase their volume of business, even though the salesman is not needed to handle the livestock received by the firm, including the additional volume of business which he brings with him The inevitable result of these conditions is to burden the unit cost of salesmanship with salaries that have no relation to the reasonable costs of salesmanship or to the actual selling service rendered to the producer. Because of the excessive number of firms and salesmen, a computation made on the basis of aggregate, actual, or appraised salaries for all sales-

[11] This conclusion is supported by the testimony of the witness Bates. In the course of naming ten firms which had retired between 1933 and 1937, the witness remarked in passing that three firm owners, whom he named, had gone to work for other firms (R. 1261–1262).

men on the market, or even for selected groups of salesmen, would not furnish the Secretary with any adequate test of the reasonable cost of salesmanship. Under the Packers and Stockyards Act the duty of the Secretary is to prescribe reasonable rates, and the proper performance of that duty required him in this case to reject the actual costs of salesmanship at the Kansas City market as the sole test of reasonable salesmanship costs.[12]

Despite the fact, however, that actual performance cannot be accepted as a test of reasonableness, it is to be noted that the record shows that in fact there are some salesmen at the Kansas City market who attain or approximate the performance figures selected by the Secretary even under conditions which render efficient use of their time and efforts by each of the salesmen employed in an overcrowded market practically impossible.

For example, John Clay & Company in 1931 sold 117,345 head of cattle and calves (Gov. Ex. 115,

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[12] It is interesting to note that the commission firms in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, made exactly the same contentions which have been made by appellees in this case. In presenting their case to the master appointed by the District Court, they argued that the Secretary's allowance would not cover the actual salesmanship costs as experienced by the various agencies during the test period. On the basis of this argument, the master stated as one of his reasons for holding the rates confiscatory that they would fail by $294,477.20 to produce salesmanship costs (*Tagg* record, p. 112). This finding by the master was reversed by the District Court, 29 F. (2d) 750, and that reversal was sustained by the Supreme Court, 280 U. S. 420.

pp. 65, 66). Taking the year as an entirety, 4 5/12 salesmen sold this number of cattle and calves.[13] Dividing the volume by this number of salesmen, it appears that, on the average, each salesman sold 26,568 head, or about 2,500 head above the performance figure taken by the Secretary.

A salesman for the Moffett Livestock Commission Company testified that on the preceding Monday his firm had 31 cars of cattle to sell and all but 10 head were sold on that day by the three cattle salesmen selling for the firm (R. 758). Assuming that each salesman handled one-third of the cattle, it appears that each of the three on the average sold more than twice as many cattle as would be considered a day's performance under the Secretary's finding. The witness said he felt that the firm's sales force was able to handle the 31 cars efficiently (R. 759).

The Bowles Livestock Commission Company sold 49,973 head of cattle (excluding calves) in 1931 (Gov. Ex. 115, p. 65). Two salesmen disposed of

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[13] It appears that this firm employed four full-time salesmen and two extra salesmen to sell cattle and calves during that year. However, one of the two extra salesmen was employed for a period of seven months and the other for a period of four months. One of the so-called full-time salesmen, Mr. James Reid, was manager of the company and devoted only ½ of his time to selling and related services and the remainder to his other duties (Government Exhibit 115–B, p. 69). On the basis of these facts it is clear that if the year is taken as a whole the company employed only 4 5/12 salesmen.

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these cattle. Murphy, one of these two salesmen, spent approximately 20% of his time on other duties (Gov. Ex. 115 B, p. 13). It thus appears that each of the two cattle salesmen exceeded the performance figure selected by the Secretary.

When the actual performance figures are considered in conjunction with the opinion evidence appearing above, the conclusion becomes inescapable that the Secretary had ample evidence upon which to determine reasonable salesman and buyer performance and that the evidence amply supports the determinations which he made.

So far as concerns the salary figures which the Secretary found to be reasonable for such performance, we need only direct the Court's attention to paragraph 139 of the order (R. 264–269), in which are set forth tables showing the salary schedules of employed salesmen. These tables were compiled on the basis of actual salaries presumably arrived at by arm's-length bargaining.[14] Examination of all of these tables, particularly of the one showing the substantial reduction between 1931 and 1937 in the salaries drawn by the same individuals (R. 268), will establish beyond question the soundness of the Secretary's judgment in selecting $3,600 as the salary to be associated with the selling or

[14] There is an omission in the table reproduced on page 266 of the record. At the head of the first column there should be added the figure $12,000.

buying of 24,000 head of cattle and calves per year.[15]

From two sources come added support for these conclusions. The first is the fact that just such evidence as we have recounted above has been used by the Secretary in determining reasonable sales performance at other markets. In *Acker* v. *United States,* 298 U. S. 426 (involving the Chicago market), the market agencies made the same objection to the use of opinion testimony and the same complaint against "hypothetical standards" as have been consistently advanced by appellees in this case. All in all, it may fairly be said, we think, that exactly the same types of evidence were used in making the determination as to reasonable sales performance at the Chicago market as were used in this case to determine reasonable performance at the Kansas City market. The evidence did not vary substantially in either quality or quantity. In upholding the order in the *Acker* case this Court said (298 U. S. at pp. 429–430):

> What is a typical salesman's performance, and a fair recompense for it, is a matter of judgment based upon all the facts. That the Secretary considered and weighed the evidence is clearly shown by his findings; that

[15] The median salary in 1931 was $2,400 (R. 266) and the two cattle salesmen included in the comparative table who received that salary in 1931 received an average salary of $1,784 in 1937 (R. 268).

he exercised an informed judgment upon it cannot successfully be denied.

Finally, it is most significant that appellees presented no evidence at the reopened hearing which could be said even remotely to challenge the accuracy of the Secretary's findings—and this depsite the contentions so vigorously advanced by them throughout this litigation. Not one witness was called to testify on the subject of salesmanship performance. Appellees did, it is true, produce certain exhibits at the reopened hearing which they argued were designed to discredit the facts relating to salesmanship performance and to the conclusion that the market was overmanned. One of these exhibits showed that there had been a decrease of approximately twenty-five percent in the number of firms since the close of the record in the prior hearings (Petitioner's Ex. A–7, see Reproduction of Exhibits, p. 87). Another exhibit showed, however, that this decrease in the number of agencies had been accompanied by almost the same decline in volume (Petitioners' Ex. A–6, see Reproduction of Exhibits, p. 86; Order, par. 111, R. 252). The decline in volume appears to have been fairly uniform throughout the market inasmuch as the thirty-eight firms in business both in 1931 and 1937 suffered a decline in total volume of approximately twenty-two percent. For the same years the reduction in personnel for these firms

amounted to less than thirteen percent.[16] Thus the plain inference from appellees' own evidence is that the decline in personnel has not kept pace with the decline in business and, consequently, the overmanned condition of the market persisted throughout the impounding period.

We submit that there was ample evidence in the record to support the salesmanship performance figures adopted by the Secretary. The failure of appellees to adduce any evidence in refutation of the testimony as to reasonable salesmanship performance taken together with the showing of actual performance in spite of the overmanned condition of the market compels the conclusion that the Secretary's finding is unassailable. Even under the test which the lower court chose to apply, the finding should have been sustained. Obviously, the application of the proper rule of judicial review requires that the Secretary's finding be upheld.

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[16] In 1931 the total headage for all species handled by the thirty-eight firms was 4,338,198 and those firms employed 220$^{9}/_{12}$ salesmen, buyers, and solicitors. In 1937 the total headage handled by the same firms was 3,388,907 and the firms employed 192$^{8}/_{12}$ salesmen, buyers, and solicitors (Petitioners' Exs. A–14 and A–16; see Reproduction of Exhibits, pp. 89, 90).

III

THERE IS NO SUPPORT FOR THE DISTRICT COURT'S FINDING THAT THE RATES PRESCRIBED IN THE ORDER OF JUNE 20, 1939, FAIL TO COVER THE COSTS FOUND BY THE SECRETARY TO BE REASONABLE

The District Court adopted and entered the following findings of facts [1] (R. 338):

> 30. The rates prescribed in the order of June 20, 1939, did not either as applied to the year 1931 nor as applied during any year of the impounding period provide petitioner market agencies a margin of $100,923.57, as stated in paragraph 163a of said order of June 20, 1939, between the revenues produced under the rates and the reasonable costs together with a reasonable profit as allowed by said order. On the contrary, because of the error made in the order in estimating the yield from said rates and of the necessity of surcharging this alleged margin with a proper annual allowance for Social Security taxes, public liability in-

[1] The findings are a short summary of appellees' principal argument on the merits in the District Court. On prior appeals appellees have followed the technique of attacking the costs found reasonable by the Secretary as being lower than actually experienced costs, and of protesting against the reduction of cost and profit items on the ground that maintenance of the *status quo* by the market agencies was thereby rendered unprofitable, if not impossible. Finally recognizing that the decision in *Acker* v. *United States*, 298 U. S. 426, is a complete answer to that contention, they now urge for the first time that the rates prescribed fail to produce revenues sufficient to cover the costs and profit found reasonable by the Secretary.

surance, administrative and general expenses for the support and maintenance of the Kansas City Live Stock Exchange and for the entire rate case expense sustained by petitioners instead of only that part thereof attributed to the administrative proceedings and amortizing this rate case expense over the 4.27-year period of the impounding of said fund instead of over a ten-year period as allowed by the order, there was no margin, but instead a yearly deficit resulted from the operations of petitioner market agencies.

* * * * * *

33. Because of the rigidity of the rate schedules prescribed in said order of June 20, 1939, the increase, during the impounding period, in petitioners' expenses of operating and conducting their businesses was not provided for in said schedules of rates.

Apparently applicable to the above findings is the conclusion of law that (R. 344):

> The acceptance by this Court of the rates contained in the Secretary's order of June 20, 1939, as the basis for the distribution of the impounded funds would produce an unjust, inequitable, and unlawful result. [Conclusion of Law No. 8].

We shall discuss first the ruling that the Secretary incorrectly estimated the yield of the rates prescribed and then, seriatim, the several items of expense which the court held the Secretary improperly disallowed.

A. THE SECRETARY CORRECTLY ESTIMATED THE YIELD OF THE RATES PRESCRIBED

In a footnote to paragraph 163a of the order (R. 294) the Secretary computed the revenues and costs as to each species of livestock on the basis of 1931 volume, using the rates and costs found by the 1939 order to be reasonable. The computation shows that on the basis of 1931 volume, the present rates would cover all reasonable costs and produce a spread between revenues and reasonable costs and profits of $100,923.57. If there be deducted from this spread those items of expense found to be allowable but not specifically covered into the rate calculations (Social Security taxes and a portion of the rate case expenses) there would still remain an unincumbered spread of some $87,000 (Order, par. 163a, R. 296).

Appellees challenged these computations because they said there is a manifest overstatement of the income which the market agencies would receive from handling cattle and calves. Consequently, primary attention will be given to the manner in which the Secretary computed the yield from cattle and calf receipts. The basic figures which he used were taken from an exhibit prepared by appellees' accountant which appellees made part of the record in the reopened proceeding (R. 422; see Reproduction of Exhibits, pp. 1–7). The accountant, by an extensive sampling process, applied the rates in the 1933 order (which were the same rates pre-

scribed by the 1939 order) to each firm's actual receipts of cattle and calves in 1931 (R. 242).[2] From these figures he determined that the per head yield of the Secretary's rates as to cattle and calves, if applied in full to buying and selling, would be for all of the firms an average of 47.79¢. Thus it was possible to determine the total yield of the rates on cattle and calves by multiplying the total volume for that year by 47.79¢. Similar computations were made as to hogs and sheep. The Secretary's estimated margin of $100,923.57 is the difference between the total revenue from all species and the total reasonable costs.

Appellees have always contended that the Secretary's rates would not actually produce 47.79 cents per head as to cattle and calves because the rates are not applied in full to buying operations. On the basis of the lower buying rates which appellees al-

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[2] For example: The sample of cattle and calves for Firm No. 4 used by appellees' accountant was 32,979 head (Reproduction of Exhibits, p. 2, column 2) out of total receipts of that firm of 35,763 (id., p. 14, col. e). The $15,388.80 of revenues received by that firm from the sample (id., p. 2, col. 5) divided by the 32,979 head in the sample gives a per-head revenue of 46.66 cents (id., p. 14, col. f). This per-head revenue of 46.66 cents applied against the total volume of 35,763 head gives a total revenue as to cattle and calves of $16,687.02 (id., p. 14, col. g). A like computation was made for each firm. The sum total of the revenues as to each species divided by the total number of head of each species resulted in the average per-head figures of 47.79 cents as to cattle and calves (id., p. 15, col. f), 20.96 cents as to hogs (id., p. 17, col. f), and 7.78 as to sheep (id., p. 19, col. f).

legedly charge, their accountant determined that the actual per head revenue for cattle and calves would be 46.57 cents (computed on basis of figures appearing in column h, p. 14, Reproduction of Exhibits). On the basis of this figure it is asserted that the revenue from cattle and calves produces a spread of only $6,624.20 in excess of the reasonable costs and profits found by the Secretary,[3] and that this spread must be applied against $52,812.27 of the expenses per annum claimed by them to be properly allowable and chargeable against cattle and calf revenues resulting in a deficit as to cattle and calves of $46,188.07 (Appellees' brief on merits, p. 136). Similar computations as to hogs and sheep result in margins of $9,766.82 and $31,974.54, respectively, producing, appellees assert, an overall deficit for all. There are several very clear answers to these contentions.

1. In the first place, of course, the claim of a deficit arises only when the rates are applied in the discriminatory manner in which appellees have applied them, namely, in full against sales but only partially against purchases. We submit that ap-

[3] The computation is as follows: 2,284,207 (total head cattle and calves) X 46.57 cents (revenue-producing power of rates as claimed by appellees) produces total gross revenue as to cattle and calves of $1,063,755.20. 2,284,207 X 46.28 cents (aggregate of reasonable costs and profits applicable to cattle and calves as found by the Secretary) amounts to $1,057,131. The difference between these totals is $6,624.20, which appellees claim is the maximum spread attributable to cattle and calves under the Secretary's rates.

pellees have no right to claim that rates prescribed as reasonable cause a deficit until they have exhausted the revenue-producing capacity of those rates. The point arose and was decided in *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750 (D. Neb.). In delivering the opinion of the District Court, Judge Woodrough said (p. 756):

> The plaintiffs also claim that the audits of the business of the plaintiff, Tagg Brothers and Moorhead, and the business of R. M. Laverty show that those concerns would lose money under the Secretary's rates. As to Tagg Brothers and Moorhead, they would, if the condemned excesses in expenses be continued and the increased rates allowed by the Secretary be disregarded. These increased rates apply only to speculators. It appears that the practice has become established for the plaintiffs to charge a certain class of persons called speculators or yard traders half the regular commission which shippers generally have to pay for the same service. The Secretary evidently thinks this discrimination improper and in his schedule he eliminates it and authorizes the plaintiffs to charge such traders and speculators the same rates that apply to all others. Both the commission men and the speculators are certain that the whole business of buying for resale on the market will quit, to the detriment of the livestock industry, unless the discriminatory rates are continued; but that is prophecy.

> The court has no function where such forecasts of the future clash. Abstractly, speculation appears to be a feature of all open markets everywhere and might continue at South Omaha even without discriminatory commission rates in favor of speculators. But the future, and not the courts, must determine. It follows that the showing of probable loss to Tagg Brothers and Moorhead on the hypothesis of half rates to speculators instead of full rates as prescribed by the Secretary is immaterial.

A similar argument was made in this Court when the case was appealed (Brief for Appellants, No. 45, 1929 Term, pp. 83–84) but this Court affirmed, 280 U. S. 420, 442. Here, as in the *Tagg Brothers* case, appellees base their claim to a deficit upon their unwillingness to avail themselves of the full revenue-producing power of the rates prescribed by the Secretary. Obviously there is no justification for increasing the charge against livestock producers in order that appellees may discriminate in favor of, and grant rate concessions to, livestock buyers and speculators; yet this would be the necessary consequence of accepting appellees' argument. "Just, reasonable, and nondiscriminatory" rates could not be derived from an application of the principle which appellees advance, and the Secretary was not only justified in rejecting it but under the mandate of the Act was compelled to reject it.

2. Another fallacy behind appellees' claim of a deficit is the attempt to segregate the revenues and

costs applicable to a single species and to apportion an arbitrary percentage of the additional expenses to that species. Appellees do not conduct a departmentalized business and there is no justification for attempting to discredit the Secretary's order by arbitrary cost accounting designed to prove a deficit in handling a portion of the total business.

The Secretary was prescribing rates for the entire livestock business at the stockyard, not simply for cattle and calves. Even as to the relatively few firms which would show a deficit on cattle and calves under the Secretary's rates (*infra*, pp. 125–127), the sheep and hog business of some at least would produce an excess over reasonable costs sufficient to overcome this deficit.[4]

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[4] Thus, firm number 12 appears by Table 1 (Appendix B) to have sustained a deficit of 1.34 cents per head as to cattle and calves. If we take this figure at face value it nevertheless appears that the firm enjoyed an excess over reasonable costs of 2.10 cents per head as to hogs and 10.02 cents as to sheep. If we disregard the latter figure because the firm handled so few sheep, it still appears that the firm realized a substantial excess over costs as to 10,633 head of hogs received by rail and 13,697 head received by truck (Gov. Ex. 114–12). Firm number 26 appears to have a deficit as to cattle and calves in the amount of 1.55 cents per head, but it, too, enjoys an excess over reasonable costs of 3.21 cents per head as to hogs and 9.46 as to sheep. The excess as to hogs was applicable to 3,248 head received by rail and 13,705 by truck (Gov. Ex. 114–26). Firm number 87, according to Table 1, could claim a deficit of 3.60 cents per head as to cattle and calves. As a matter of fact, however, it handled only 564 head of rail cattle and calves and 389 which arrived

Clearly the excess over costs as to one species will tend to cancel any deficit which might exist as to another, and the audits of the several firms which we have referred to show the practical operation of that mathematical principle.[5]

3. Plainly, then, the only sensible test of the Secretary's rates is the spread between costs and revenues for all species of livestock. In the footnote to paragraph 163a of the Order (R. 294) there appears an application of the Secretary's findings of reasonable costs and profits against the total volume of each species, showing total reasonable costs and profits as to all species of $1,357,276.15. The total revenues receivable by appellees as to all species, as computed by the Secretary, i. e., by using 47.79 cents as the per-head revenue for cattle and calves, is shown to be $1,458,199.72. If this revenue figure be recomputed, using appel-

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by truck, while its 91,795 head sheep business, which was predominantly straight-rail single-ownership, produced a per-head revenue of 1.01 cents in excess of reasonable costs (Gov. Ex. 114–87).

[5] We respectfully submit that this is not at all comparable to placing a high freight rate upon wheat to advantage the shipper of coal, as appellees suggested. The Secretary is compelled to prescribe rates applicable to many firms, not to a single organization, and his rates necessarily must take into account the fact that each firm conducts its business differently from the others. Unless a separate rate is to be made for each firm, there is no way to avoid having an occasional firm show a deficit as to one species that must be (and is) recouped from its other business. *Cf.* Firm 87, discussed above.

lees' own figure of 46.57 cents per head for cattle and calves, the total revenue receivable from all species is $1,430,332.40.* The over-all spread thus appears to be either $100,923.25, if the rates be applied as the Secretary intended them to be, or $73,056.25 if they be applied, by charging buyers less, in the discriminatory manner employed by appellees. In either event the spread is ample to cover all items of cost not included in the rate structure—even those improperly claimed by appellees.

The defect inherent in appellees' contention is further demonstrated by an examination into the facts as to each individual firm involved in the computation of the averages. In Appendix B, *infra,* pp. 186–189 there appear two tables which set out for each firm, and as to each species, the revenues per head collectible under the Secretary's rates—Table 1 showing the result of applying the rates as the Secretary intended (i. e., in full to buying and selling) and Table 2 showing the result

* See the following table:

Selling & Buying	Head	Per Head Revenues as claimed by appellees	Total Revenues
Cattle & Calves	2,284,207	0.4657	$1,063,755.20
Hogs	1,044,948	.2096	219,021.10
Sheep	1,896,608	.0778	147,556.10
Total Revenue all Species			1,430,332.40

of applying the rates as appellees would apply them (i. e., in full to selling but not to buying).

As to cattle and calves, Table 1 shows that of the 59 firms *all but nine would have had per-head revenues in excess of the reasonable per-head costs as found by the Secretary.* Table 2 shows that if the per-head revenues for each firm be determined in the same manner as appellees arrived at the figure of 46.57 cents, there are only eight additional firms, or seventeen out of fifty-nine, whose per-head revenue as to cattle and calves would fail to equal the per-head cost found reasonable by the Secretary. In the case of hogs, Table 1 shows four firms with a deficit, and Table 2 shows 7. In the case of sheep, Table 1 shows no firm which would have failed to earn the Secretary's reasonable costs; and if the rates be applied in appellees' fashion, Table 2 discloses that only one firm would sustain a deficit.

The per-head costs set forth in the tables are the costs which the Secretary, pursuant to the direction of the statute, found to be the reasonable costs for all firms. Likewise, the rates which the Secretary prescribed were the reasonable rates for all firms. It is not to be expected that a schedule of reasonable rates observed by all of the firms will produce the same per-head revenues in the case of each. Nor is it to be expected that the revenues produced by such rates will, in the case of each firm, exceed the costs found to be reasonable as to all

firms. The rates are designed to be, and in the nature of things must be, applied by each firm to its business as a whole; and a firm prospers or fails depending upon whether its business is such as to enable it to hold its costs within the revenues produced.

These considerations invite inquiry into the factors determining the amount of per-head revenues. It is clear, for instance, that a firm whose business consists very largely of straight rail cattle and calves will receive a smaller per-head revenue than will a firm which receives the same species largely by truck. It will not be disputed, however, that the straight rail single-ownership type of business is the least expensive kind to handle. A firm which handles that type of business, therefore, will receive revenues less than the average but at the same time its expenses will be less than the normal. It is a comparison of these two figures which determines whether the firm succeeds or fails, not a comparison of its individual per-head revenues with the costs found by the Secretary to be normal and reasonable as to all firms.

The record permits a concrete illustration of our point. Table 1 (Appendix B) shows that firm number 12, for example, received per-head revenues on its cattle and calf business of 44.94 cents, which was 1.34 cents less than the cost found reasonable and normal by the Secretary. An examination of the audit of that firm, however, shows

that its busines was abnormal in that the vast bulk of its cattle and calf business was straight rail[7] (See Order, pars. 26, 27a; R. 216–218). In a tabulation dealing in terms of averages, the firm will naturally appear out of balance because its per-head revenues will be lower than the normal. The same situation will be found in the case of most of the other firms whose per-head revenues appear on the face of the tables to have been less than per-head reasonable costs.[8]

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[7] Gov. Ex. 114–12 shows that it *resold* 2,344 head of cattle and 556 head of calves. Since appellees' accountant did not apply the full rate against traders and speculators, this firm realized less revenue than it could have as to nearly 3,000 head of cattle and calves. For original sale the firm received 27,669 head of single-ownership cattle and 5,904 head of plural-ownership cattle, all in straight cars, and 1,237 head of single-ownership and 109 head of plural-ownership calves in straight cars. In mixed cars it received 4,984 cattle and 2,809 calves under single ownership, and 4,621 cattle and 2,406 calves under plural ownership. Thus, out of a total of 67,947 head of cattle and calves handled by this firm, 49,739 head arrived in the manner which occasioned the least per-head costs. The same firm received by truck only 3,706 head of cattle and 1,843 head of calves.

[8] Firm number 26, for example, would seem to have a per-head deficit of 1.55 cents, according to Table 1. This firm handled 30,383 cattle and calves (Gov. Ex. 114–26). Of these, 3,713 head of cattle and 409 head of calves were seconds as to which a lesser rate than that prescribed was applied. Of the total, also, only 3,759 arrived by truck. This firm is likewise out of balance when we deal in averages. Firm number 37 is so small as hardly to justify notice. Its total revenues were less than $2,000 in 1931. It handled 2,122 head of cattle and calves of which 632, or nearly one-third, were seconds (Gov. Ex. 114–37). The next firm

We have pointed out above that if the rates be applied as the Secretary prescribed, there would be a gross spread of $100,923.57 for all firms as to all species, and that even if the rates be applied as appellees contend they should be, there remains still an over-all spread, applicable to all species, of $73,056.25. Manifestly, appellees' assertion that on the basis of 1931 volume the Secretary's rates would not produce revenues to cover the costs he found reasonable cannot stand in the face of these figures.

B. THE SECRETARY MADE AMPLE PROVISION FOR ALL PROPER EXPENSES NOT INCLUDED IN THE REASONABLE COSTS

In an effort to bolster their claim of a deficit, appelles have argued that the Secretary either excluded or accorded improper treatment to certain items of expense incurred by them and properly allowable in arriving at unit cost. Appellees listed the following annual expenses as applicable to cattle and calves: Social Security taxes, $3,357.78; rate case expense of $162,524.16, amortized over the impounding period of 4.27 years, or $28,599.68 annually; public liability insurance, $7,263.78; and administrative and general expenses not included by the Secretary, $13,591.03.[9] These items total $52,812.27, which amount appellees allocated to the

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shown in Table 1 to have received per-head revenues less than normal costs is firm number 42. This firm received 67,492 head of cattle and calves of which 59,805 represented rail business.

[9] Appellees' brief on merits, p. 136.

expense of selling cattle and calves and charged against a margin of $6,621.20 realized from and attributable to the sale of cattle and calves, as the revenue from such sales was computed by appellees (see footnote 3, p. 118, above).

1. *Social Security Taxes.*—Examination of paragraph 163a of the order (R. 295) will disclose that the Secretary recognized the expense of Social Security taxes and allowed therefor the full amount to which appellees could have become liable, namely $5,000.00.[10] As to this item there is no room for a claim that any amount properly allowable was disallowed.

2. *Rate case expense.*—The claim was made by appellees, and accepted by the Secretary, that they had incurred on account of the administrative and court proceedings in this case expenses totaling in excess of $165,000. Appellees wished to amortize the entire amount over the period covered by the present order, roughly four and one-quarter years, and to attribute $28,599.68 per year to cattle and calves. The Secretary recognized as a legitimate expense for rate purposes that portion of appellees' total expenses chargeable to the cost of the administrative hearings, which, in the absence of evidence, he assumed was approximately

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[10] Apparently appellees attribute a little more than three-fifths of this expense to the cattle and calf business, and presumably apply the same percentage to the other items listed above.

one-half of the total of $165,000. This amount, $82,500, the Secretary amortized over a period of ten years (Order, par. 163a; R. 296). Appellees contended and the court below has held that the Secretary erred in excluding from consideration that portion of the total expenses attributable to court proceedings, and in selecting ten years instead of 4.27 years as the period of amortization.

The Secretary was clearly right in selecting ten years as the proper period of amortization. This proceeding began in April 1930 and has been in active litigation before either the Secretary or the courts ever since; hence the Secretary spread the expense which he allowed over the entire period during which such expense was being incurred.

We have been unable to discover any decision of this court which definitely settles the question whether, under the circumstances of this case, the Secretary should have allowed the entire rate case expense or only that portion attributable to the administrative hearings. However, *Driscoll* v. *Edison Co.*, 307 U. S. 104, 120–121, would appear to indicate that the Secretary may have been justified in refusing to allow the expenses of court litigation. In any event, there was no prejudicial error if the Secretary was wrong in his conclusion because the result is only to narrow the margin and not to create a deficit.

The two items of expense as allowed by the Secretary—Social Security taxes, and rate case ex-

penses amortized over the ten year period—total $13,250 (or, at the most, $21,500 if the Secretary should have allowed court expenses). They were not included in the calculation the reasonable per head costs set out in the order. But, as the order finds and as we have shown above, the spread of $100,000 produced if the rates are properly applied is more than ample to cover them.[11]

3. *Other expenses.*—The remaining expenses listed by appellees are not properly allowable in any event. The claim was made for an allowance of $7,263.78 a year for the cost of public liability insurance. But one of appellees' own witnesses, an insurance expert, testified that he knew of no instance where a commission firm actually carried public liability insurance.[12]

The remaining item of expense claimed amounts to $13,591.03, being made up of Exchange dues and assessments, and traveling and automobile ex-

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[11] Even if the rate case expenses were amortized over the 4.27 years of the impounding period, and even if the court expenses be included, the total, including Social Security taxes, is only $33,599.68. This is far less than the spread of $100,000 expected by the Secretary and less even than the $73,056.25 spread resulting from an application of appellee's discriminatory rates.

[12] The witness testified that he knew of no instance where a commission firm carried public liability insurance "for the reason that the public liability rests on the Yard Company mostly. The responsibility of the commission firm would be more or less contingent; and we would not urge the carrying of that form of insurance along with the other insurance" (R. 1146).

penses which appellees claimed were improperly included under the general heading of business-getting and maintaining expense. The argument in this respect involves simply a question as to the proper classification of those cost items and does not present an issue as to the costs to be allowed appellees. As we shall show (*infra*, pp. 159–162) both Exchange dues and traveling expenses are properly classifiable as business-getting and maintaining costs. Without further elaboration of the point we submit that the Secretary clearly did not err in refusing to cover these items into the rates as administrative and general expenses.

C. THE RIGIDITY OF THE RATE STRUCTURE DID NOT MAKE THE RATES INADEQUATE DURING THE IMPOUNDING PERIOD

1. In the court below appellees argued that the Secretary's rate structure was designed to apply to conditions under which livestock arrived at the market in large consignments principally by rail. It was their contention, as reflected by Finding 33 of the court below, that due to changes in the mode of arrival and size of consignments of livestock during the impounding period, the rates became increasingly inadequate because they could not be adjusted to meet the change. We submit that the record does not support that contention.

Appellees' argument rested principally on the increase in the transportation of livestock by trucks. There has admittedly been such an increase, and it would normally result in the produc-

tion of a greater number of work units per thousand head of animals handled, since consignments shipped by truck usually contain fewer head than consignments shipped by rail. In the consideration of this fact, however, there are two offsetting factors which cannot be ignored. The first is that transportation by truck existed before 1933; that, indeed, as we point out hereafter, *infra*, p. 169, the change in the mode of arrival was generally greater in the years prior to 1931 than between 1933 and 1937 (Order, pars. 26, 27–a, R. 216–218). By 1931, therefore, the situation had crystallized sufficiently to afford a satisfactory basis for judgment. A second factor, of course, is that while work units are increased if more and smaller consignments are received per 1,000 animals, the revenue from handling such consignments is also increased because as the number of head in the consignment decreases the rate increases. Since rail consignments of cattle in 1931 contained an average of 31.43 head [13] while truck consignments contained only 4.02 head and since the cattle rate breaks at 20 head (Order, par. 180, R. 301), it is inconceivable that an increase in truck consignments and a corresponding decrease in rail consignments did not operate to throw more consignments into the higher rate bracket.

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[13] This figure is derived from the table following paragraph 116 of the Secretary's order (R. 255). The total number of head received divided by the total number of owners gives the average head per consignment.

2. Appellees have argued that the rates would not operate in this fashion as to calves and hogs because the number of head per consignment in rail shipments of those species was already below the breaking point of the rates (20 for calves and 40 for hogs).

The Secretary's order contains a table setting forth in detail the data which refutes that argument (R. 255). For convenience of discussion we condense a part of that table in the footnote below.[14] Examination of the table below will disclose, as to calves, that while the greater number of rail *consignments* contained less than twenty head (see columns headed Mixed Cattle and Calves, plural owners, and Mixed All Species, plural, owners),[15] by far the greater number of *animals* arrived in consignments containing more than twenty

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[14] See the following table:

Calves	Selling							Buying	
	Straight Rail		Mixed Cattle & Calves		Mixed, All Species		Truck	Rail	Truck
	Single Owner	Plural Owners	Single Owner	Plural Owners	Single Owner	Plural Owners			
Head	14,035	1,228	73,170	36,604	6,885	5,894	98,911	28,826	4,319
Owners	151	30	2,573	4,770	294	2,110	41,010	423	403
Head per owner	92.95	40.93	28.43	7.67	23.42	2.79	2.41	67.91	10.72

[15] A consignment is "all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day" (R. 300). Hence, in the table above the number of owners is equivalent to the number of consignments.

head (see column headed "Mixed Cattle and Calves, Single Ownership," which shows that 73,170 head—more than all the rest combined—arrived at the rate of 28.43 head per owner, well above the breaking point of the rate). The fallacy of appellees' contention is thus made obvious.

Consider again, for example, the column headed "Mixed All Species, Plural Owners." That column shows that 5,894 head of calves (a very small number) arrived by rail mixed with other species, and that there were 2,110 owners for this number of animals. The average head per owner in this mode of arrival was 2.79. But obviously appellees' expenses would not have noticeably increased if these particular rail calves had switched to truck-ins, because, as the table shows, calves arriving by truck came in consignments containing 2.41 head as compared with 2.79 head by rail. In other words, over 2,000 consignments could have switched from rail to truck without making any material difference in unit costs. So far as the record shows, it may have been in this very category that the increase in truck-ins occurred. Or instead, the increase may have occurred in the category where there were the greatest number of calves, namely, mixed cattle and calves, single ownership. If the change occurred there, it means that an increasing number of the 73,000 calves arriving by rail in consignments averaging 28.43 head

began arriving by truck in consignments averaging 2.41 head and consequently taking a higher rate.

A similar situation exists as to hogs. Examination of the table below [16] (condensed from Order, par. 116, R. 255) will show that more than one-third of all *consignments* of hogs by rail contained an average of 9.64 head (see number of owners in column headed, Mixed All Species, plural owners). But truck consignments of hogs contained an average of 11.38 head. Consequently, if this one-third of all rail consignments of hogs had switched to truck-ins there would actually have been fewer work units per 1,000 animals. Also, as in the case of calves, the greatest number of *animals* arrived in consignments averaging well over the breaking point (see column headed Straight Rail, single ownership, showing 235,335 head of hogs arriving in 3,007 consignments at the average rate of 78.26 head per consignment). If the switch to truck shipment came in this category, it would again be inconceivable that appellees' revenues did not in-

[16] See the following table:

Hogs	Selling					Buying	
	Straight Rail		Mixed All Species		Truck	Rail	Truck
	Single Owner	Plural Owners	Single Owner	Plural Owners			
Head	235,335	83,875	55,671	49,388	678,156	65,579	23,526
Owners	3,007	5,488	529	5,123	59,587	407	489
Head per owner	78.26	15.28	105.24	9.64	11.38	161.12	48.11

crease, since when arriving by truck all seventy-eight head would take the higher rate while in the rail shipment all over forty head would take the low rate.

It thus appears that a shift from rail to truck transportation would occasion no increase in costs as to a large number of consignments while such a shift would be productive of increased revenues as to a very large number of animals. We do not suggest that these facts completely discredit the whole of appellees' contention. The Secretary's order (par. 26–28; R. 216–218) recognizes the change which has occurred in marketing practices. We submit, however, that the existence of the change affords no basis for appellees' contention that the cost of doing business was thereby substantially increased and revenue greatly diminished.

3. Appellees suggested in their brief below (p. 58), in a rather cursory fashion, that in the reopened hearing they had adduced evidence as to the yield of the rates when applied to the 1936–1937 business. This suggestion was highly misleading. Through the witness Bates appellees offered in evidence an exhibit (Respondent's Exhibit A–6, R. 1265–1267; see Reproduction of Exhibits, p. 86) showing the consolidated revenue headage of the appellee market agencies from 1928 to 1937. At the foot of the exhibit there appeared certain computations which purported to "equal-

ize" hogs and sheep to the cattle and calf basis, that is to say, according to the computations set forth, 2.14 hogs or 5.36 sheep produced the same income as one head of cattle between 1933 and 1937. Government counsel objected to the exhibit because the basis of the equalization was not explained. Thereupon counsel for appellees undertook to show by the witness Bates that the figures in question had been derived "by judgment" from certain rate tests purportedly conducted by appellees' accountants. Bates testified that he had no personal knowledge in this regard but that he had been told that the Secretary's rates had been applied to the business of twelve firms for the period from June 1936 to June 1937 and that the average per head yield as to cattle and calves was found to be 45.04 cents. Bates admitted, however, that he did not know what firms had been used in the test and he did not know whether the accountants had used the entire volume of each firm or only a sample. (R. 1265–1267; T–3, 614–617, 648–650.)

It is perfectly clear from Bates' testimony that no weight can be attached to the purported test of the revenue producing capacity of the Secretary's rates during the impounding period. The testimony was elicited not for the purpose of proving the test itself but merely as an incident to proving certain exhibits which did not themselves even show directly the results of the test. Moreover the accountants who made the test did not

testify; none of their compilations or work papers were produced; and the only person who was called to give evidence on the point knew only the little he had been told. Considering the convincing character of prior tests and the vigor of appellees' contention that the Secretary's rates failed to produce sufficient revenue to meet costs during the impounding period, it seems remarkable that if the test in question was worthy of serious notice appellees were so casual about proving it, and, after proving it, almost completely ignored it.[17] One is justified in suspecting, in the light of all the circumstances, that the test which appellees made might not bear close scrutiny.

4. In any event, extended discussion of the revenues produced by the Secretary's rates seems unjustified in view of the fact that by appellees' own admission their arguments are merely shadow boxing. After one hundred and twenty-five pages of argument on the merits in their brief below appellees summarized with the following statement (p. 126):

> We have in this brief, using the Order's own findings as a basis, calculated the hypothetical deficits that would result automatically from the application to these facts of

[17] In their brief on the merits in the District Court appellees devoted less than a page to a discussion of this test, their strongest statement concerning it being that "The test in 1936–1937 was made by competent accounts." The record does not even establish that fact.

> the findings made. This, too, shows indisputably the inaccuracy of the forecasts. *We do not contend that these deficits actually resulted.* We do contend that on the basis of the Order's own statements they would have resulted. [Italics supplied.]

Thus, at the end of the first decade of this case we discover that appellees have throughout been devising arguments which, as Judge Otis put it, "a medieval scholastic would have loved" (R. 1332)—but entirely within a vacuum. We learn now that while appellees have protested bitterly because the Secretary's rates failed to cover costs, they were talking not about *actual* deficits but about *hypothetical* deficits.

In this, we submit, lies the answer to appellees' repeated insistence that the Secretary committed fatal procedural error in not proving the rates mathematically against actual experience. In this lies the explanation of why appellees found the Kitchen memorandum so welcome, and induced the majority below to make such extravagant use of it. Appellees were better situated than anyone else to observe the actual operation of the Secretary's rates; they knew better than anyone else whether the Secretary's rates had produced a margin or a deficit. Yet, possessed of all the facts, appellees chose to rest their case on hypothetical computations rather than on their actual experience. Appellees' tactics, more forcibly than any argument we could make, vindicate the Secretary's

judgment in the first instance, as expressed in the order of June 14, 1933, that the rates contained in the present order were just and reasonable for the period from 1933 to 1937.

IV

EVERY FACT AND CIRCUMSTANCE WHICH OUGHT TO HAVE BEEN CONSIDERED BY THE SECRETARY IN THE REOPENED PROCEEDING WAS GIVEN DUE CONSIDERATION

Appellees took as the theme of one of their principal contentions below the words of Mr. Justice Brandeis that a court "may set aside an order * * * because facts and circumstances which ought to have been considered were excluded from consideration" (concurring opinion in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 74–75). They prevailed upon the court to enter a finding that the Examiner "excluded from consideration facts and circumstances relevant to the determinations to be made and was upheld by the Secretary of Agriculture in said rulings" (Findings of Fact No. 26, R. 343), and a conclusion of law that the Secretary "erroneously excluded from consideration in the reopened proceedings facts and circumstances material and relevant to the determination he was undertaking to make" (Conclusion of Law No. 6, R. 338).

The court made no detailed findings as to the facts and circumstances which it regarded as having been erroneously excluded from consideration by the Examiner and the Secretary. We assume,

therefore, that the court adopted in toto appellees' various contentions, and we shall discuss the point accordingly.[1]

A. THE SECRETARY DID NOT ERR IN SUSTAINING THE EXAMINER'S RULINGS ON THE ADMISSIBILITY OF EVIDENCE

1. The only finding which specifically charges the exclusion of evidence by the Examiner is as follows (R. 343):

> The Examiner denied the request of petitioner market agencies, made during the reopened hearing, that the annual reports of the Producers Commission Association and of the Farmers' Union Live Stock Commission Company filed with the Secretary for the years from 1932 to 1937, inclusive, be produced for introduction by them in evidence, and the Secretary by his said order of

[1] When the above finding and conclusion of law was proposed by appellees we pointed out to the court that it was not clear whether they meant that the Secretary had erroneously refused to admit certain relevant facts into the record or had erroneously ignored certain relevant facts of record and had excluded them from his deliberations, both of which contentions appellees had advanced, and we requested that if such a conclusion were adopted the ambiguity in that respect be removed (R. 332). Appellees responded that the conclusion of law "follows the findings showing that the Secretary did improperly exclude the facts and circumstances relevant to the determination he was undertaking to make" (R. 335–336). The majority adopted the finding and conclusion without change, with the result, we submit, that it is impossible to know with certainty what was intended.

June 20, 1939, sustained this ruling. [Finding of Fact No. 31.]

The background of the above finding is this: At the reopened hearing counsel for appellees called as a witness Mr. F. W. Miller, Assistant Chief of the Packers and Stockyards Division, Bureau of Animal Industry, and in the course of examination asked if the Division had custody of the annual reports of the Producers Commission Association and the Farmers' Union Live Stock Commission Company, two cooperative commission companies operating at the Kansas City market (R. 1256–1257). In response to an affirmative answer counsel requested the production of such reports for the years 1933 to 1937. Objection to their production was interposed by the Government (R. 1257) on the basis of the following provision which the Packers and Stockyards Act incorporates (7 U. S. C. § 222) from the Federal Trade Commission Act (15 U. S. C. § 50):

> Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor.

The Examiner sustained the objection on this ground (R. 1257–1258) and we think rightly so. The two cooperative commission companies whose reports were involved had accepted the Secretary's 1933 rates and were consequently not actively in-

terested in the reopened proceeding. It seems clear from this fact that appellees had no right, in the face of the statute, to demand of an employee of the Department of Agriculture that he take from the departmental files and turn over to appellees' counsel the confidential reports of those companies filed under compulsion of law. Appellees were not without remedy from the Examiner's ruling, however, for the statute distinctly gave them the right to seek the Secretary's authorization or a court's direction for the disclosure of the reports in question. They took neither course, but stopped short with an objection to the Examiner's adverse ruling and an offer of proof. We submit that appellees' failure to utilize their statutory right foreclosed the present claim of error.[2] *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 226.

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[2] Appellees have heretofore relied on *Blair* v. *Oesterlein Co.*, 275 U. S. 220, to support their claim of error. The case is thoroughly inapplicable on the facts. There, a taxpayer appealed to the Board of Tax Appeals from a determination by the Commissioner of Internal Revenue. To sustain his contention, he secured the issuance by the Board of a subpoena directing the Commissioner to produce the tax returns of other taxpayers involving a pertinent point. The Commissioner refused to respond. This court held (p. 227) that the applicable statutory prohibition against disclosure "cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or *quasi*-judicial proceeding." Appellees' demand for disclosure in this case was not supported by legal process of any sort notwithstanding their statutory right to such process was clear.

The majority's finding in this connection and a passage in the concurring opinion of Judge Reeves might seem an indirect holding that the Examiner misconstrued the statutory provision in question (R. 1319). Even if it be assumed arguendo that he did, it does not follow that his ruling was erroneous and prejudicial. Appellees have said that they wished to use the reports of the two cooperative companies for the years 1933 to 1937 to show the results of acceptance of the Secretary's 1933 rate order. Those two companies did accept the 1933 rates and the evidence shows that both of them experienced financial difficulties during the ensuing years. The evidence does not, however, establish a causal relationship between the acceptance of the rates and the financial difficulties. Judge Reeves felt, nonetheless, that "this evidence was competent, at least for the purpose of showing what the experiences of the agencies were in their operations, to the end that the Secretary might have been informed as to the part his rates may have played in the financial difficulties of those agencies" (R. 1319).

It would be somewhat less difficult to accept that view of the matter if appellees had displayed a true interest in bringing to light the actual individual financial experience of the market agencies under the 1933 rates. If the annual reports of the cooperative associations were as relevant and material as appellees' contentions would make it

appear, certainly appellees' own annual reports must necessarily have been much more pertinent and persuasive since they concerned firms which were parties to the proceeding and were complaining of the rates. Strangely enough, however, *not one of the appellee market agencies offered its own annual reports in evidence.* It is no answer for appellees to say that the Secretary should have assumed the duty of proving actual experience, for the objection here is that they were themselves prevented from doing so.

It is also no answer for appellees to point to the statements which they introduced at the reopened hearing (Petitioners' Exhibits A–4 and A–5, R. 1250; see Reproduction of Exhibits, pp. 59, 83) showing for the period from 1933 to 1937 the consolidated figures taken from the annual reports of all firms except the cooperatives. Consolidated figures, aggregates, and averages are not uncommonly employed to conceal facts. The 1933 rates were based on a reasonable unit cost derived in part from an examination of the actual cost experience of each firm, not of all the firms collectively. Those rates were applied by each firm individually, not by all firms collectively, and the experience of the firms under them was individual, not collective. The fact that appellees, better than anyone else, knew precisely what their own actual individual experience under the 1933 rates had been is without doubt the surest clue to their reliance on a consolidated statement.

Whatever, therefore, may be the academic answer to the present question it is, we submit, impossible to entertain seriously the thought that appellees were prejudiced by the Examiner's ruling.

2. As we have said before, the finding just discussed is the only one which specifies any evidence deemed to have been improperly excluded by the Examiner. However, the opinion of Judge Van Valkenburgh relates another rejection of evidence by the Examiner which may be briefly noted. The opinion states (R. 1313–1314):

> The rulings of the examiner were arbitrary in many cases and were uniformly sustained upon exceptions to the Masters' report. In one case the chief accountant for the Packers and Stockyards Division of the Department of Agriculture was asked whether he assisted in the preparation of the order in the Kansas City proceeding. The object, of course, was to show by whom in fact the findings and order were formulated, it having already been held that they were not framed in any legal sense by the Secretary himself. Counsel for the Government interposed "objection to this particular question and all other questions of the same tenor for the reason that the Secretary's order speaks for itself" and therefore that such questions "are not germane to any issue in this proceeding." But in the first Morgan case (298 U. S. 468) the Supreme Court

> expressly held that "the Secretary's recitals of his procedure in such cases are not conclusive on the question whether the statutory requirements were obeyed."

The foregoing passage is somewhat deceptive. The episode which Judge Van Valkenburgh relates occurred some time in October 1932 (R. 1068). The inquiry as to the chief accountant's participation in the drafting of the order in the Kansas City proceeding had reference not to the present order of June 20, 1939 and not even to the order of June 14, 1933, but to the order of May 18, 1932. That, the court may recall, was the first rate order issued by the Secretary of Agriculture in this case. It was immediately set aside on appellees' motion and a rehearing ordered on the ground of economic changes. We think we may confidently assert that the ruling of the Examiner in this connection, whether right or wrong, is no longer a live issue.

The foregoing discussion disposes of the charges which appellees advanced in the court below against the Examiner's rulings on evidence. It is apparent from what has been said that the rulings were correct. In any event appellees suffered no prejudicial error which would justify the court in voiding the Secretary's order. We submit that the District Court's ruling to the contrary amounts to a studied attempt to capitalize upon any possible flaw in the administrative process.

B. THE SECRETARY GAVE PROPER CONSIDERATION TO APPELLEES' PROPOSED FINDINGS AND EXCEPTIONS TO THE EXAMINER'S REPORT

There remains to be considered the Secretary's alleged erroneous and prejudicial exclusion from consideration of material and relevant facts and circumstances. Nothing in the findings or opinions gives a clue to the facts deemed to have been ignored, and we shall therefore follow the outline of appellees' argument below.

In their brief on the merits in the court below appellees asserted that "facts and circumstances * * * set forth in the proposed findings of petitioners * * * were arbitrarily excluded from consideration." For proof of this assertion appellees quoted the Secretary's statement (Order, paragraph 15–dd, R. 211) to the effect that certain of appellees' exceptions (which contained their proposed findings) "were well taken, and their content is reflected in the findings hereinafter made," while others "were without merit and have been given no weight in the determinations made and set forth herein."[3] Appellees' contention is grounded principally upon their failure to distinguish between excluding a fact from consideration and giving it no weight when it is found to lack merit.

1. *The increase in livestock prices.*—In the development of the argument below appellees re-

[3] Appellees' brief on merits, 38–48.

ferred first to their proposed finding 10–a (Exceptions to Examiner's Report, see Reproduction of Exhibits, pp. 277–279) relating to the increase in the price of beef cattle, hogs, and sheep between 1933 and 1937. Certain portions of this proposed finding the Secretary admittedly adopted (Order, par. 110, R. 251), but appellees contended that the most significant and relevant portion was omitted. In short, the complaint was that while the Secretary had set up a table showing for each year from 1931 to 1937 the average price per 100 pounds received for each species of livestock by livestock producers, he did not in addition set out appellees' table showing the same figures expressed in parity index numbers (the base period being from August 1909 to July 1914). Appellees asserted that from the index table "there flowed as a matter of course the conclusion that the price of meat animals more than doubled in the period intervening between 1932 * * * and 1937." However, examination of the table in paragraph 110 showing average prices per 100 pounds (R. 251) will show quite clearly and without the aid of an index number the extent of the price increase. Obviously, the Secretary did not exclude this fact from consideration.

The relevance of this fact, appellees asserted, was that, if meat prices rise, livestock salesmen and buyers ought naturally to receive increased compensation, whereas in the present order the Secretary found the reasonable allowance for the salary of these employees to be lower than in the former

order. There are, we submit, two complete answers to this contention.

The first is that the Secretary made no salary "allowance" in the sense in which appellees persist in using that term. He attempted only to arrive at a figure that would represent in dollars the compensation which it would be reasonable for a salesman or buyer to receive for performing what was found to be a reasonable year's work. In other words, the salary figure is one factor of an equation, and only that. Interestingly enough, in view of appellees' argument, the use of the lower salary figure in the present order, as a consequence of reducing the number of head reasonably to be handled per salesman, results in the allowance of a higher unit cost for salesmanship than did the use of the higher figure in the former order. See Order, par. 142, R. 275–277.

A second answer to appellees' contention is that in determining the altitude of just and reasonable rates under the Act there is no necessary connection between the value of the article sold or the profit to the owner from the sale, on the one hand, and the compensation to be allowed to the commission man for selling, on the other. Moreover, fluctuation in the price of livestock does not appear to have any substantial influence in this connection. A member of one of the commission firms testified that "the general level of commission charges observed at Kansas City has at no time within the last 20 years gone up or down with the prices of

livestock" (R. 946). We submit that no error is shown in the Secretary's treatment of appellees' index table.

2. *The increase in costs of living.*—Appellees' next contention related to the increase in the cost of living in Kansas City between the years 1933 and 1937. At the reopened proceeding appellees produced Department of Labor statistics showing that during those years living costs rose approximately ten percent (Exhibit A–10, R. 1267, transmitted as original document) and they proposed a finding to that effect (Exceptions to Examiner's Report, par. 10–b, see Reproduction of Exhibits, p. 279). Appellees contended that in the face of increased living costs the Secretary could not justifiably find that the reasonable salary of a livestock salesman was lower between 1933 and 1937 than in 1931. However, not only is it the admitted fact that salesmen's salaries were actually substantially lower in 1937 than in 1931 (Respondents' Exhibit A–13; Order, par. 139, R. 268), but the Secretary's findings as to reasonable salaries were related in part to 1929 and 1931 data, and it is a matter of common knowledge (as shown also by appellees' exhibit) that in 1929 and 1931 living costs were comparable to those in 1937. To point to the rise from 1933 to 1937 without mentioning the decline from 1929 to 1933 is thoroughly misleading.

Appellees attempt to explain away the fact that salaries actually declined between 1929 and 1937 by pointing to the testimony of the witnesses Bates

and Witherspoon, who testified in general that salaries were reduced below reasonable levels on account of loss of income, which loss they attributed directly to the Secretary's 1933 rate order and the District Court's impounding order. We shall comment later on this general topic (*infra*, pp. 162–171). For present purposes it is sufficient, we think, to point to the extreme vagueness and uncertainty of the witnesses upon whose testimony appellees rely. Neither Bates nor Witherspoon was able to supply any definite information in support of the opinions expressed. As a matter of fact, Bates testified that he had made no salary reductions in his own firm (R. 1264), and with respect to the salaries paid by other firms to their employees he knew "nothing definite, * * * merely a conversation probably with the owner who told me he had reduced salaries * * *" (R. 1270). We submit that there was no basis in the evidence for the inference which appellees would have the court draw from the proposed finding.

3. *The decrease in number of firms and personnel.*—A further attack was leveled against the finding that there were more firms and larger personnel on the Kansas City market than was necessary to dispose of the available volume of business (Order, par. 129, R. 259–260). Appellees contended that the Secretary had failed to consider evidence as to the actual number of agencies in business on the

market at various periods. Appellees proposed findings set forth that information (Exceptions to Examiner's Report, par. 11 (a) (b), see Reproduction of Exhibits, pp. 284–286), but they were not incorporated in the Order. The information itself appears in substance, however, in the first fifteen paragraphs of the Order, where the Secretary recites the history of this case from its beginning in April 1930 to its reopening in June 1938 (R. 197–212). In view of the fact that the Secretary, in this portion of the Order, lists the firms which were parties to the original proceeding and later those firms which were parties to the reopened proceeding, it cannot be seriously asserted that the Secretary was unaware of the decline in the number of agencies during the period here involved. But appellees contended that he must not have given consideration to the fact because he nevertheless found that there were too many agencies in business during the period.

We think it is clear that the findings for which appellees contended had no materiality justifying their inclusion in the order, or even entitling them to especial consideration.[4] In the first place, there

[4] Proposed finding No. 2, Exceptions to Examiner's Report; see Reproduction of Exhibits, pp. 266–267, was based on the testimony of witness Bates at the reopened hearing. On direct examination he was asked to name the firms which had gone out of business since the issuance of the 1933 order. He named F. O. Morgan, H. H. Klecker, H. F. Carnes, Drumm-Standish, Harry Kennaley, Ham Knighton, J. D. McCormick, B. L. Welch, W. E. Curtis, Greer & Co., and

is nothing significant about the number of retirements from business since the inauguration of this proceeding in 1930 or since the entry of the im-

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W. G. Land; and he testified that "in all cases capital was depleted to the point where these men retired from business" (R. 1261–1262). The impression was sought to be conveyed that these retirements from business were forced by the impounding order of the District Court and by the decrease in the volume of business which was occasioned by the reduction in the amount available for business getting and maintenance. (See R. 1263–1264.)

That the impounding under the order of the Court was not the real cause of the retirement of these firms from business is demonstrable on the record.

On December 31, 1931, F. O. Morgan had capital in his business in the amount of $4,136.99. During the year 1931, he received a net owner income from his business of $1,430.08. He has impounded with the registry of the Court $117.56. It seems absurd to claim that the impounding of $117.56 would wipe out a capital of over $4,000. The record shows that the volume of this firm was extremely low. Throughout the entire year it sold 99 cars of sheep, 1,571 head of driven-in sheep, and bought two cars. The firm's total gross revenue for the year was $2,392.50. (Government Exhibit 114–1.) It is not unreasonable to conclude that lack of business forced this firm's retirement. Three of the other named firms which went out of business had little or no capital as of December 31, 1931, namely Carnes, McCormick, and Welch (Government Exhibit 114–33, Government Exhibit 114–66, Government Exhibit 114–72), indicating that these firms were cleared by other firms. The total gross commissions of Carnes in 1931 amounted to $1,643.75; those of Welch to $1,695.05; those of McCormick to $1,983. Obviously, it was not the impounding which brought about the retirement of these firms, but the lack of a sufficient volume of business. The record (Government Exhibit 114–51) shows that in 1931 Harry Kennaley made a net owner income of $17,703.78. Appellees asserted that the rates prescribed by the Secretary

pounding order in 1933. From the time the Packers and Stockyards Act went into effect until the first hearing in 1930—a period of great prosper-

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in his order of June 1933 would have produced $7,354.99 less than the amount produced by the tariff actually in effect. This means that Kennaley would have had a net owner income during the year of over $10,000 under the rates prescribed by the Secretary. On December 31, 1931, the net worth of his business as shown by the record was $20,152.67. His impounding with the registry of the Court was $3,064.70. It is obvious that the reason for his failure must be sought elsewhere than in the effect of the impounding. The attorney for appellees in his argument before the Secretary of Agriculture (Transcript of Argument, p. 107) gave the real reason. He said: "Nobody knows better than the gentleman who sits there [the reference was to the attorney for the Government], that Kennaley wasn't booking his costs. What was he doing He had been a former hog buyer over at Armour's. He developed a trucked-in hog business. He was working with the truck drivers, paying them large bonuses to bring in hogs to him and take them away from the other commission firms, and he didn't dare put that on his books." Manifestly it was these excessive and questionable expenditures to obtain volume that put Kennaley out of business, not the impounding. The firm of Drumm-Standish went out of business March 13, 1936. The record shows (Government Exhibit 114–35) that this firm had listed among its assets as of December 31, 1931, notes receivable on account of loans in the amount of $640,843.83, less notes discounted in the amount of $418,108.23, leaving net notes receivable on account of loans at $222,735.60. The net worth of its business on December 31, 1931, was $124,871.36. The impounding of $2,843.30 could not have wiped out $125,000 of capital. The firm of Greer & Company had owner's capital in its business on December 31, 1931, of $50,480.15. It had among its assets $48,000 in real estate and notes receivable of $18,409.84 (Government Exhibit 114–76.) Here again the impounding of $2,158.57 obviously could not have put this firm out of business.

ity—166 firms retired from business (Pets. Ex. 61). Between the first and second hearings—a period of less than two years, and before the impounding commenced—18 firms retired from business (Order, par. 11, R. 205–206). Appellees attach great importance to the fact that an additional 18 firms retired in the four years between June 1933 and June 1937 (Pets. Ex. A–7, R. 1254, Reproduction of Exhibits, p. 87). The facts briefly recited above show that there is a normal turnover of agencies at Kansas City at all times; and this conclusion is borne out by the fact that a number of firms entered business at Kansas City after June 1933 and quit before the reopening of this proceeding (see Return to Order to Show Cause, par. 5 (5), R. 306). We think it clear that no particular significance can be attached to the facts upon which appellees rely.

In the second place, neither in determining the reasonableness of rates in effect nor in prescribing reasonable rates to be charged should the Secretary necessarily be guided by the number of agencies in business or the number which are unable to prosper under a particular rate schedule. Obviously, if a market is too greatly overmanned, *reasonable* rates will force some firms out of business; but this result merely follows from the fact that unreasonable costs cannot be sustained by reasonable rates.

Appellees asserted that a second factual consideration important in the determination of

whether or not there were too many agencies at Kansas City was a comparison of the average volume of business handled there with the average of agencies at other stockyards. Appellees proposed a finding showing in general that the average volume per agency at Kansas City was considerably higher than the average per agency at other comparable markets. The Secretary made no finding reflecting that situation. Appellees therefore deduced "a wholly arbitrary refusal to weigh facts and circumstances that should be considered."[5]

Here again appellees obviously fail to distinguish between considering a fact, on the one hand, and attaching importance to it, on the other. There are at least two sufficient reasons for attaching no importance to the facts here in question. The first is that without an extensive inquiry into the number and size of all the agencies at all the markets involved in the computation, and collateral inquiry into all the factors which might affect the result, no answer would be a reliable basis for judgment. The average volume per agency at a market composed of a few large firms could not properly be compared to the average volume per agency at a market composed of a large number of small firms. In the second place, even if this difficulty were overcome, the facts would still be thoroughly immaterial. Comparisons of volume

[5] Appellees' brief on merits, p. 44.

as between one stockyard and another can have no significant bearing upon the reasonableness of the rates at either. Volume has bearing on unit costs, but only within the particular stockyard or market agency under investigation, and certainly not in comparison with other stockyards or other agencies. Consequently the Secretary was justified in attaching no weight to appellees' proposed finding in this respect.

4. *The seasonality of receipts.* Appellees also asserted that it would have been pertinent for the Secretary to consider evidence to the effect that the existing agencies were taxed to their maximum capacity during the period of peak receipts. Appellees acknowledged that the order comments on the seasonality and fluctuations of receipts and characterizes certain testimony bearing on this point (Order, par. 140–b, R. 273–275), but they complained because the Secretary failed to mention the testimony of the witness Witherspoon at the reopened hearing concerning the activities of salesmen and yardmen during peak periods in 1936 and 1937. The testimony to which appellees referred indicated that during peak periods some employees at the market were forced to work as late as ten o'clock at night (R. 1281). This testimony was merely cumulative of other evidence in the record bearing on the point and did not justify separate and particular notice. Moreover, all such evidence had to be considered in the light of the statutory requirements that rates be just and rea-

sonable. Unavoidably, there are peak periods and slack periods in the business of marketing livestock, but certainly the Secretary could not properly prescribe a rate which would be high enough to permit the maintenance throughout the year of a force sufficient to handle peak-period business without the necessity of occasional overtime work. The Act contemplates rates which will be just and reasonable to all affected by them, and the determination of such rates necessarily calls for the exercise of expert and informed judgment in the balancing of interests. We submit that appellees' contention in this respect looks toward an absence of balance and was properly rejected.

5. *Business-getting and maintenance expense.* The final contention under this head was that the Secretary failed to adopt appellees' proposed findings relating to the character of the expenses classified by the Secretary as business-getting and maintaining expense. This was a rather abbreviated renewal of the contention several times heretofore advanced that traveling expenses, including the expense of automobile operation, and Live Stock Exchange dues and assessments should not be classified as business-getting and maintaining expenses but as administrative expenses.[6]

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[6] The reason for the contention is that reasonable administrative expenses are allowed as an individual item of cost while business-getting and maintaining expenses are required to be covered by a stated percentage of other costs (R. 283–287).

As to the item of Live Stock Exchange dues and assessments, it is perfectly plain on the record that the Exchange is primarily a business-getting and maintaining instrumentality. Admittedly the Exchange performs some administrative functions, but the record does not show that it was principally for the performance of such functions that the Exchange was organized or that its expenses are incurred. As one witness put it: "The livestock exchange here at Kansas City does carry on activities and makes efforts to attract business to this market in competition with St. Joseph and Omaha and other markets. That is done for the general benefit of all the commission men and the exchange leaves to each firm to get out of that business what hey can" (R. 1238). "All these activities of the exchange are designed primarily to benefit and attract the people who might consign livestock to Kansas City" (R. 1239; see also R. 479–480, 899–901, 927–928, 1100, 1232–1233). Certainly there is no factual basis for disagreeing with the Secretary's classification of this item.

As to the item of traveling expense, paragraph 148 of the order (R. 283–284) lists the various types of nonsalary expenses which go to make up the item of business-getting and maintaining cost and sets out the total expenditures, by species, of each firm for this item, expressed in cost per head. These total expenditures for each firm are broken up into their component parts in Government Exhibit 115,

at page 24. The Court will see that out of a total expenditure of some $283,750 for business-getting and maintaining, the market agencies spent about $131,000 on advertising (which includes certain office expenses incident to preparing and mailing market circulars, etc.) and about $127,500 on travel,[7] or a total of $258,500 on these two items. It thus appears that nearly half of the total expense involved in getting and maintaining business is that attributable to travel.

The solicitation work carried on under the head of "travel" took a number of different forms. The commission men regularly made country trips, some of them even covering the southwest portion of the United States (R. 479, 491, 688). Special services were frequently rendered to prospective customers, in the form of inspection of livestock, arrangement for pasturage, and the procurement of financing. At the reopened hearing the evidence showed that these practices had remained substantially unchanged (R. 1275). The patent purpose of rendering such services has always been to induce shippers to deal through the firm giving the services. Obviously, expenses incurred for that purpose may properly be classified as business-getting and maintaining expenses.

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[7] This figure is made up of $112,569 actually attributed to travel and $10,550 charged against automobile operation and $4,629 against automobile depreciation.

Appellees concluded their argument on this point with the assertion that the Secretary ignored evidence introduced at the reopened hearing to the effect that the limitation upon traveling expenditures "did seriously affect not only market volume but also the returns of producers for livestock handled by these agencies." They charged arbitrary action in the Secretary's refusal to accept a proposed finding to that effect.[8]

Appellees' contentions in this respect cannot be reconciled with the facts. It is true, of course, that witnesses at the reopened hearing attributed the loss of volume at the market to the curtailment of expenditures for advertising and country solicitation trips, which curtailment they blamed on the Secretary's rate order and the District Court's impounding order (R. 1263, 1264–1265, 1270, 1274); but the Secretary was not called upon to accept testimony at variance with uncontroverted evidence (*infra*, p. 165).

Indeed, the testimony of the witnesses themselves does not show with any convincing force how much volume has been lost through reduction in advertising expenditures, how much more money appellees deem it necessary or prudent to spend for getting and maintaining business, or how much additional business might reasonably be expected from such expenditures if made. Since appellees were pressing their charge in this respect with such

[8] Appellees' brief on merits, pp. 47–48.

apparent earnestness, counsel for the Government questioned witnesses Bates and Witherspoon as to how much money they had been spending on advertising and as to how much business their firms had lost through reduction in advertising expenditures;* and counsel questioned Witherspoon at some

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* Appellees made a deceptive argument in this connection in contending that expenditures for advertising dropped from approximately $240,000 in 1923 to $52,851 in 1937 (Return, par. 7 (b) 12, R. 311–312; Petitioners' Proposed Finding 11–f; see Reproduction of Exhibits, p. 287). Their exhibit A–5 (Reproduction of Exhibits, pp. 83–85) shows the following expenditures for advertising for all firms from 1923 to 1937:

1923	$242,922.56	1931	$87,324.09
1924	251,300.89	1932	88,431.78
1925	231,288.67	1933	77,752.47
1926	190,129.78	1934	74,934.49
1127	142,967.41	1935	62,012.61
1928	170,174.95	1936	61,767.43
1929	143,647.25	1937	52,851.64
1930	121,182.57		

An examination of the exhibit will show, first of all, that the figures down to 1928 include horse and mule commission companies. It will further show that in 1923, 1924, and 1925 the item of advertising, as reported in the commission firms' annual reports, included expenditures for travel and entertainment. From 1926 on, travel and entertainment expense is carried as a separate item, and since it amounted to $110,229.94 in 1926 it is obvious that a considerable part of the total of $242,000 must have been attributable to that expense in 1923. In addition to this fact, it must be noted that prior to 1931 the expense of telephone and telegraph also was included in the charge against advertising. The charge against advertising in 1930 was $121,182.57 as compared to $87,324.09 in 1931, which reveals the difference caused by the inclusion of the item of telephone and telegraph expense. Of course, any useful comparison must take

length as to how much additional money he wanted to spend for advertising, and how much additional business he would expect to get from such expenditures. Although both witnesses professed the conviction that the decrease in volume which the market had suffered was attributable to a large extent, if not entirely, to the curtailment of business getting and maintaining expenditure, neither could give any estimate as to how much business his firm had lost, how much he had been spending for advertising, or how much he had been forced to cut down on his expenditures; and Witherspoon persistently avoided stating how much more he wanted to spend and how much extra business the additional expenditure might be expected to produce (R. 1270, 1278–1280). Witherspoon did testify that his firm had discontinued advertising in papers, in convention numbers of magazines, in the Kansas City Star, and in the Drovers Telegram. "But those reductions relate back to just prior to that order we got [i. e., the order of June 14, 1933] and since that time we have confined ourselves largely toward functioning through our regular customers who ship to us" (R. 1279).

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these facts into consideration; one cannot set off $52,000 against $240,000 because they are not comparable figures. When the situation is thus revealed in its true light, it appears that while there was a decline in the commission firms' advertising budget during the fifteen years from 1923 to 1937, it was gradual and constant, and not abrupt and drastic as appellees would have it appear.

In view of appellees' repeated insistence that volume during the impounding period fell off because they were unable under the 1933 rates and the District Court's impounding order to make country solicitation trips and keep up contacts with their patrons, it is extremely interesting to note the course of actual expenditures on this item. Exhibit A–5 mentioned above, shows the following entries against travel and entertainment:

1926	$110,229.94	1932	$114,274.49
1927	105,479.47	1933	108,267.45
1928	105,429.69	1934	111,372.55
1929	101,290.79	1935	98,707.72
1930	113,614.45	1936	103,265.97
1931	112,489.10	1937	102,339.55

One could hardly suggest that the fluctuations in these expenditures were unusual or abnormal. Certainly there was no significant decrease in this item after the impounding order went into effect. Indeed, in 1934, appellees spent nearly as much for travel and entertainment as they spent in 1931; in 1936 and 1937 they spent more than they did in 1929. In view of these figures, we submit that it was not error for the Secretary to reject appellees' proposed finding.

The absurdity of appellees' contention that the failure of the Secretary to make adequate allowance for business-getting and maintaining caused a decline in volume at the market and a consequent reduction of revenue is emphasized by the fact that all items—both of income and expense—show a decline from 1923 to 1937. Income in 1923 totaled $3,099,931.03. Gradually but consistently it

dropped to $2,315,942.51 in 1929 to $1,940,336.72 in 1931 to $1,607,748.73 in 1933, to $1,437,767.85 in 1934, to $1,287,102.49 in 1935, to $1,223,521.20 in 1936, and rose slightly to $1,229,927.65 in 1937. Total expenses in 1923 were $2,598,647.53. By 1929 they had dropped to $2,173,387.23, to $1,879,686.96 in 1931, to $1,506,918.60 in 1933, to $1,207,845.97 in 1937 (Pet. Ex. A–5, see Reproduction of Exhibits, pp. 83–85). There was no impounding order during the ten years from 1923 to 1933 and yet volume, income, and expenditures were all declining at the Kansas City market. Likewise there was in effect in those years a schedule of rates which, it may be assumed, furnished appellees with a satisfactory allowance for business getting and maintaining expenditures, and still volume consistently slipped. Significantly, the type of business getting and maintaining activity which appellees appear to regard as most effective, namely country travel and solicitation, was practically uncurtailed throughout the whole period. The conclusion becomes inescapable that the fallacy of appellees' position is a superficial and erroneous association of cause and effect.

In reality, of course, the problem and the answer to it go much deeper than any of those arguments; they go back farther than the impounding order of the District Court or the 1933 rate order of the Secretary. Paragraph 20 of the present order (R. 213–214) sets out in tabulation, by species, the total number of livestock marketed at Kansas City and

four of its principal competitors from the states tributary to the Kansas City market, and the percentage of the total marketed at each. From these tables it appears that the total volume of cattle and calves marketed at the five markets from these states dropped from 4,864,862 in 1920 to 4,774,019 in 1931 while the Kansas City stockyards' share of the total dropped from 49.5% in 1920 to 40.7% in 1931. In other words, while there was only a 2% decline in total volume of cattle at the five markets, there was a 20% decline in the Kansas City market's share of that total. Similarly, hog receipts at the same markets totalled 7,030,618 in 1920, of which Kansas City's percentage was 32.1%. Total volume dropped only to 6,652,778 in 1931, but Kansas City's share of the business fell to 19.4%. In the case of sheep, volume rose by one-half, from 3,060,016 in 1920 to 4,540,010 in 1931, while the share going to the Kansas City market declined from 47.9% to 45.8%.

The continuation of the trend illustrated above is shown by a comparison of receipts for thirty-eight firms at Kansas City for the years 1931 and 1937 (Pets. Ex. A–14, Reproduction of Exhibits, p. 89; Order, par. 20–a, R. 214–215). Cattle and calf receipts dropped from 2,031,482 in 1931 to 1,854,958 in 1937; hog receipts from 790,692 in 1931 to 363,568 in 1937; and sheep receipts from 1,516,-024 to 1,170,381. Yet, as the evidence shows and the order points out (Pets. Exs. A–2, A–11; Order, par. 111, R. 252), the livestock population of the

states normally tributary to the Kansas City market increased during this period, except in the case of hogs.

There would be no end to an inquiry into all the economic ramifications of these facts. For present purposes it is enough to point out that during the past fifteen years or more livestock marketing has undergone a gradual change which has been unfavorable to the Kansas City market. It was not the 1933 rate order or the District Court's impounding order which brought about the slightest part of this condition; volume—which is admittedly the only salvation of any such market—had been slipping for many years before either order became operative. The chief reason for this condition has been the gradual change in marketing practices, and this fact appellees realize as well as anyone. At the reopened hearing counsel for appellees asked the witness Witherspoon (T–3, 663; R. 1273):

> Q. Where has this business been going? It has been shown here as against past periods cattle population in these States, which Dr. Dozier testified were tributary to Kansas City, has increased. Where has the business been going in your opinion, Mr. Witherspoon, which is represented by this diminished volume handled by agencies at Kansas City?
>
> A. It is my judgment it has gone to your country sales rings, to your smaller competitive markets, and to direct buying.

Unquestionably this shift is largely attributable to the growth of motor-truck transportation. The order shows the great change which has occurred in the manner of arrival of livestock at the Kansas City market (see paragraphs 26–27a, R. 216–218). In 1922, 99.05% of all cattle received at the market was shipped by rail. In 1931 the percentage had dropped to 88.85%, and 1937 was 72.37%. Correspondingly, truck-in receipts of cattle increased from 0.95% in 1922 to 11.15% in 1931 and to 27.63% in 1937. Receipt of calves by rail in 1922 was 94.42% of the total, while in 1931 it was only 64.84% and in 1937 only 56.01%. Truck receipts had grown from 5.58% in 1922 to 35.16% in 1931 and to 43.99% in 1937. Even more extreme is the case of hogs. In 1922, 94.51% of all hogs arrived by rail and only 5.49% arrived by truck. By 1931 the rail percentage had dropped to 48.45% and truck receipts had increased to 51.55%, while between 1931 and 1937 rail receipts declined further to 10.47% of the total and truck receipts soared to 89.53%. Receipt of sheep by rail suffered much less, the percentage of the total falling only from 92.89% in 1922 to 79.23% in 1937.

This change at the Kansas City market is clearly but a phase of a widespread revision of the entire set-up in the industry. Witness Witherspoon was questioned about the operation of the smaller sales rings and markets, and he testified in part (T–3, pp. 663–664, R. 1273–1274):

The WITNESS. When it comes to the sales pavilion or what we call country sales those rates of commission range as far as my knowledge goes all the way from three to five percent. Some of these smaller competitive markets, such as the Springfield, as near as I recall—I would like to refresh my memory as to the record you had in your files—is around seventy-five cents a head, but the record would be the best evidence in that case.

Q. On the cattle, you mean?

A. Yes.

Q. That is cattle exclusive of calves?

A. Yes.

Q. And are the consignments in individual sizes—do they run relatively small at those smaller markets?

A. They do because they do not have hardly any rail business at those smaller markets; they do not have so many of these big transport trucks. They are smaller trucks.

While appellees have suggested that these country sales rings and smaller markets are able to compete successfully because they charge higher rates and have more to spend on business getting and maintaining, this Court is not called upon to believe that livestock producers would have supported these markets throughout the years at their own expense and to their detriment. There is undoubtedly some sound fundamental economic reason for the evolution of the small truck-in market,

just as there is reason for the growth of motor-truck transportation in other fields. Moreover, we think it is obvious the condition is not a temporary one. It has not come about suddenly, and there is no perceptible trend toward a restoration of the marketing conditions of a decade ago. Whether one method of marketing or one mode of transportation is preferable to another is not a material consideration at this point. The fact which is important is that there nas very definitely been a change affecting in a fundamental way the economics of the Kansas City market, and that this change cannot be attributed to the Secretary's rate order or the District Court's impounding order, notwithstanding appellees' persistent effort to argue that every economic ill is an effect of those two orders.

The foregoing discussion disposes of all the matters which appellees urged in the support of their general contention that the Secretary had excluded material facts and circumstances from consideration. The reason for the obvious triviality of these contentions is that the Secretary did, as a matter of fact, give consideration to almost all of the evidence which appellees introduced at the reopened hearing. Indeed he set out a large part of it in the Order. See: Order, par. 27–a, R. 217–218, setting out tables taken from Petitioners' Exhibit A–1 (Exceptions to Examiner's Report, par. 10 (e); See Reproduction of Exhibits); Order, par. 110, R. 251, Petitioners' Exhibit A–3 (Exceptions to

Examiner's Report, par. 10 (a); See Reproduction of Exhibits); Order, par. 111, R. 252; Petitioners' Exhibit A–6 (Exceptions to Examiner's Report, par. 10 (a)); Order, par. 111, R. 252; Petitioners' Exhibits A–2 and A–11 (Exceptions, par. 10 (d)); Order, par. 148–a, R. 285, Petitioners' Exhibit A–5 (Exceptions, par. 11 (f), see Reproduction of Exhibits). Appellees' argument was, in reality, an attack upon the Secretary's judgment as to the weight which should be accorded the evidence, and the findings and conclusion of the court in this connection directly reflect appellees' argument. The error of the court, we submit, is beyond dispute. The Secretary alone is authorized to decide upon weight of evidence or significance of facts. *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed.

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MARCH 1941.

APPENDIX A

PACKERS AND STOCKYARDS ACT, 1921, AS AMENDED

(c. 64, 42 Stat. 159–169; 7 U. S. C. Secs. 181–229)

TITLE III—STOCKYARDS

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and

their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the

United States and may be recovered in a civil action brought by the United States.

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this Act; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this Act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this Act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and

[1] Amended by an act of Congress approved May 5, 1926.

keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been

filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for in-

vestigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, Board of Agriculture, or other agency of a State or Territory having jurisdiction over the stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the com-

plainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of live stock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign

commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is pre-

scribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his offi-

cers, agents, or representatives from futher disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

TABLE 1.—*Rates as applied by Secretary*

Firm No.	Cattle and calves			Hogs			Sheep		
	Per head revenue under prescribed rates, Col. f, p. 6 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost	Per head revenue under prescribed rates, Col. f, p. 6 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost	Per head revenue under prescribed rates, Col. f, p. 6 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
1							6.60	5.82	0.78
4	46.66	46.28	0.38	15.76	18.16	[1] 2.40	8.33	5.82	2.51
5							6.62	5.82	.80
6	51.77	46.28	5.49	22.10	18.16	3.94	19.51	5.82	13.69
7	48.65	46.28	2.37	23.83	18.16	5.67	21.13	5.92	15.31
9	53.87	46.28	7.59	21.81	18.16	3.65	22.09	5.82	16.27
11	47.79	46.28	1.51						
12	44.94	46.28	[1] 1.34	20.26	18.16	2.10	15.84	5.82	10.02
13	47.11	46.28	.83	20.94	18.16	2.78	15.80	5.82	9.98
14	47.62	46.28	1.34	19.00	18.16	.84	15.62	5.82	9.80
15	49.24	46.28	2.96	23.17	18.16	5.01	14.78	5.82	8.96
16	48.48	46.28	2.20	23.45	18.16	5.29	22.38	5.82	16.56
17	48.21	46.28	1.93	22.73	18.16	4.57	20.33	5.82	14.51
18	51.26	46.28	4.98	18.85	18.16	.69	8.46	5.82	2.64
19	48.54	46.28	2.26	20.21	18.16	2.05	16.75	5.82	10.93
20	47.35	46.28	1.07	20.50	18.16	2.34	17.32	5.82	11.50
23	53.50	46.28	7.22	23.17	18.16	5.01	12.61	5.82	6.79
25	51.61	46.28	5.33	22.94	18.16	4.78	14.07	5.82	8.25
26	44.73	46.28	[1] 1.55	21.37	18.16	3.21	15.28	5.82	9.46
29	48.53	46.28	2.25	20.29	18.16	2.13	20.56	5.82	14.74
30	48.34	46.28	2.06	23.52	18.16	5.36	22.36	5.82	16.54
33	47.59	46.28	1.31	22.12	18.16	3.96	20.85	5.82	15.03
34	50.99	46.28	4.71	19.18	18.16	1.02	21.20	5.82	15.38
35	46.75	46.28	.47	22.80	18.16	4.64	10.55	5.82	4.73
37	45.53	46.28	[1] .75	25.29	18.16	7.13	22.92	5.82	17.10
42	43.79	46.28	[1] 2.49	21.70	18.16	3.54	18.49	5.82	12.67
43							10.61	5.82	4.79
44	64.17	46.28	17.89	25.00	18.16	6.84	8.50	5.82	2.68
45	48.86	46.28	2.58	20.11	18.16	1.95	14.58	5.82	8.76
48	51.86	46.28	5.58	20.88	18.16	2.72	18.79	5.82	12.97
51	46.41	46.28	.13	24.76	18.16	6.60	19.93	5.82	14.11
52	48.61	46.28	2.33	22.25	18.16	4.09	14.96	5.82	9.14
53	55.45	46.28	9.17	20.64	18.16	2.48	16.64	5.82	10.82
54	46.35	46.28	.07	18.88	18.16	.72	7.04	5.82	1.22

[1] Indicates deficit.

TABLE 1.—*Rates as applied by Secretary*—Continued

Firm No.	Cattle and calves			Hogs			Sheep		
	Per head revenue under prescribed rates, Col. *f*, p. 5 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost	Per head revenue under prescribed rates, Col. *f*, p. 5 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost	Per head revenue under prescribed rates, Col. *f*, p. 6 of Attachment	Per head reasonable cost as found by Secretary, Par. 163 of Order	Variance between revenue and cost
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
55	52.34	46.28	6.06	18.77	18.16	.61	11.14	5.82	5.32
56	46.79	46.28	.51	20.22	18.16	2.06	7.27	5.82	1.45
59	46.77	46.28	.49	20.15	18.16	1.99	6.71	5.82	.89
60	52.56	46.28	6.28	24.05	18.16	5.89	21.09	5.82	15.27
61	42.07	46.28	[1] 4.21	19.93	18.16	1.77	21.04	5.82	15.22
62	49.01	46.28	2.73	23.55	18.16	5.39	20.01	5.32	14.19
63	48.14	46.28	1.86	17.62	[1] .16	[1] .54	13.99	5.82	8.17
65	48.34	46.28	2.06	19.11	18.16	.95	14.82	5.82	9.00
66	52.02	46.28	5.74	23.72	18.16	5.56	20.55	5.82	14.73
67	52.55	46.28	6.27	24.63	18.16	6.47	21.61	5.82	15.79
70	49.37	46.28	3.09	20.11	18.16	1.95	16.03	5.82	10.21
71	47.42	46.28	1.14	19.79	18.16	1.63	17.58	5.82	11.76
72	47.51	46.28	1.23	20.47	18.16	2.31	22.56	5.82	16.74
73	44.67	46.28	[1] 1.61	17.53	18.16	[1] .63	8.80	5.82	2.98
74	52.96	46.28	6.68	21.69	18.16	3.53	20.14	5.82	14.32
75	47.71	46.28	1.43	21.97	18.16	3.81	10.95	5.82	5.13
76	52.99	46.28	6.71	21.17	18.16	3.01	13.97	5.82	8.15
77	46.22	46.28	[1] .06	19.08	18.16	.92	15.02	5.82	9.20
78	51.28	46.28	5.00	18.10	18.16	[1] .06	14.05	5.82	8.23
79	49.13	46.28	2.85	21.27	18.16	3.11	11.30	5.82	5.48
82	44.69	46.28	[1] 1.59	20.08	18.16	1.92	16.19	5.82	10.37
83	48.32	46.28	2.04	21.31	18.16	3.15	16.69	5.82	10.87
84	47.97	46.28	1.69	20.95	18.16	2.79	6.49	5.82	.67
87	42.68	46.28	[1] 3.60	26.31	18.16	8.15	6.83	5.82	1.61
88	47.79	46.28	1.51	20.96	18.16	2.80			

[1] Indicates deficit.

TABLE 2.—*Rates as applied by petitioners*

Firm No.	Cattle and calves			Hogs			Sheep		
	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
1							6.64	5.82	0.82
4	46.16	46.28	[1] 0.12	15.47	18.16	[1] 2.69	7.92	5.82	2.10
5							6.64	5.82	.82
6	49.54	46.28	3.26	22.19	18.16	4.03	19.51	5.82	13.69
7	48.69	46.28	2.41	23.00	18.16	4.84	21.13	5.82	15.31
9	51.62	46.28	5.34	21.17	18.16	3.01	22.09	5.82	16.27
11	47.80	46.28	1.52						
12	44.46	46.28	[1] 1.82	20.02	18.16	1.86	13.20	5.82	7.38
13	46.26	46.28	[1] .02	20.95	18.16	2.79	15.80	5.82	9.98
14	46.15	46.28	[1] .13	19.01	18.16	.85	14.45	5.82	8.63
15	48.49	46.28	2.21	23.28	18.16	5.12	14.91	5.82	9.09
16	47.28	46.28	1.00	23.51	18.16	5.35	14.35	5.82	8.53
17	47.66	46.28	1.38	23.37	18.16	5.21	17.39	5.82	11.57
18	49.78	46.28	3.50	18.68	18.16	.52	8.27	5.82	2.45
19	48.02	46.28	1.74	16.01	18.16	[1] 2.15	12.51	5.82	6.69
20	46.40	46.28	.12	20.50	18.16	2.34	14.68	5.82	8.86
23	51.06	46.28	4.78	23.17	18.16	5.01	12.61	5.82	6.79
25	49.41	46.28	3.13	22.73	18.16	4.57	13.22	5.82	7.40
26	44.32	46.28	[1] 1.96	21.28	18.16	3.12	15.20	5.82	9.38
29	48.28	46.28	2.00	20.09	18.16	1.93	20.58	5.82	14.76
30	48.18	46.28	1.90	23.52	18.16	5.36	22.36	5.82	16.54
33	48.96	46.28	2.68	22.12	18.16	3.96	20.85	5.82	15.03
34	43.83	46.28	[1] 2.45	15.77	18.16	[1] 2.39	21.20	5.82	15.38
35	46.25	46.28	[1] .03	22.65	18.16	4.49	10.35	5.82	4.53
37	45.53	46.28	[1] .75	25.29	18.16	7.13	22.92	5.82	17.10
42	43.10	46.28	[1] 3.18	21.31	18.16	3.15	15.95	5.82	10.13
43							10.46	5.82	4.64
44							8.42	5.82	2.60
45	44.48	46.28	[1] 1.80	19.96	18.16	1.80	14.02	5.82	8.20
46	50.36	46.28	4.08	20.97	18.16	2.81	18.53	5.82	12.71
51	46.75	46.28	.47	24.72	18.16	6.56	19.09	5.82	13.18
52	48.05	46.28	1.77	22.27	18.16	4.11	14.78	5.82	8.96
53	54.79	46.28	8.51	20.64	18.16	2.48	14.03	5.82	8.21
54	44.64	46.28	[1] 1.64	17.18	18.16	[1] .98	7.04	5.82	1.22
55	49.94	46.28	3.66	18.65	18.16	.49	10.94	5.82	5.12
56	46.34	46.28	.06	19.81	18.16	1.65	7.27	5.82	1.45
59	45.18	46.28	[1] 1.10	19.53	18.16	1.37	6.78	5.82	.96
60	49.53	46.28	3.25	23.36	18.16	5.20	21.17	5.82	15.35
61	43.43	46.28	[1] 2.85	19.38	18.16	1.22	17.71	5.82	11.89
62	48.33	46.28	2.05	23.50	18.16	5.34	20.01	5.82	14.19
63	46.42	46.28	.14	15.96	18.16	[1] 2.20	10.72	5.82	4.90
65	47.99	46.28	1.71	19.12	18.16	.96	11.29	5.82	5.47
66	46.90	46.28	.62	23.72	18.16	5.56	20.55	5.82	14.73
67	52.52	46.28	6.24	24.62	18.16	6.46	22.08	5.82	16.26
70	47.99	46.28	1.71	20.18	18.16	2.02	16.11	5.82	10.92
71	46.36	46.28	.08	19.74	18.16	1.58	16.09	5.82	10.27

[1] Indicates deficit.

TABLE 2.—*Rates as applied by petitioners*—Continued

Firm No.	Cattle and calves			Hogs			Sheep		
	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost	Per head revenue under prescribed rates	Per head reasonable cost as found by Secretary	Variance between revenue and cost
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
	46.92	46.28	0.64	20.60	18.16	2.44	22.56	5.82	16.74
	44.73	46.28	[1] 1.65	14.25	18.16	[1] 3.91	9.01	5.82	3.19
	49.99	46.28	3.71	21.69	18.16	3.53	20.14	5.82	14.32
	47.20	46.28	.92	21.23	18.16	3.07	10.95	5.82	5.13
	51.79	46.28	5.51	20.41	18.16	2.25	15.34	5.82	9.52
	46.21	46.28	[1] .07	18.78	18.16	.62	14.93	5.82	9.11
	49.18	46.28	2.90	15.20	18.16	[1] 2.96	14.05	5.82	8.23
	46.80	46.28	.52	21.27	18.16	3.11	11.51	5.82	5.69
	43.36	46.28	[1] 2.92	19.95	18.16	1.79	16.52	5.82	10.70
	49.57	46.28	3.29	19.40	18.16	1.24	13.94	5.82	8.12
	47.57	46.28	1.29	18.98	18.16	.82	5.70	5.82	[1] .12
	43.12	46.28	[1] 3.16	26.21	18.16	8.05	6.94	5.82	1.12
	46.80	46.28	.52	20.96	18.16	2.80			

[1] Indicates deficit.

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